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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 528

JOSEPH A. BRODERICK, Superintendent of Banks of the State of New York,
Appellant,

vs.

MARY ROSNER, ESSIE R. STONE, CAMILLA LOWY, *et al.*

Appeal from the Court of Errors and Appeals of the State of New Jersey.

BRIEF FOR APPELLANT.

JAMES D. CARPENTER, JR.,
CARL J. AUSTRIAN,
ARTHUR OFNER,
HAROLD N. COHEN,
Of Counsel with Appellant Joseph A. Broderick, as Superintendent of Banks of the State of New York.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 528

JOSEPH A. BRODERICK, Superintendent of Banks of the State of New York, Appellant, *vs.* MARY ROSNER, ESSIE R. STONE, CAMILLA LOWY, *et als.*	Appeal from the Court of Errors and Appeals of the State of New Jersey.

BRIEF FOR APPELLANT.

Statement.

This is an appeal from a final judgment of the New Jersey Court of Errors and Appeals (Record, pp. 29-31) affirming a final judgment of the New Jersey Supreme Court dismissing the complaint of plaintiff in this action (*Id.*, pp. 23, 24). The opinion of Mr. Justice PARKER of the Supreme Court rendered upon the dismissal of the complaint is officially reported in 112 N. J. L., page 309, under the title, "Broderick *v.* Abrams." The New Jersey Court of Errors and Appeals affirmed the judgment of the Supreme Court upon the opinion of the Supreme Court justice. The opinion of the Court of Errors and Appeals

is not officially reported, but appears in the Record, page 29, under the title, "Broderick *v.* Abrams."

The Complaint.

It is alleged that plaintiff was, on and prior to December 11, 1930 and now is, the Superintendent of Banks of the State of New York (par. 1, Record, p. 3); that The Bank of United States is a moneyed corporation organized under the Banking Law of the State of New York, and maintained its office and principal place of business in the Borough of Manhattan (par. 2, R., p. 3); that on December 11, 1930, the capital of said bank amounted to $25,250,000, represented by 1,010,000 shares of the par value of $25 per share, all of which were and now are issued and outstanding, and held by some 20,843 stockholders residing in nearly every state of the United States and also residing in Cuba, Greece, Switzerland, France, Monaco, Panama, Roumania, Jugoslavia and Italy (par. 2, R., p. 3).

It is further alleged that on December 11, 1930, The Bank of United States could not with safety and expediency continue in business, and thereupon and on said day plaintiff took possession thereof pursuant to the provisions of Section 57 of the New York Banking Law,* and has since continued in possession and been engaged in its liquidation (par. 3, R., p. 3); and that prior to May 6, 1931, plaintiff determined to liquidate its affairs, and pursuant to the provisions of Section 72 of the New York Banking Law duly mailed and published notice to all of its creditors to present and make proper proof of their claims prior to June 29,

* Section 57 of the New York Banking Law, and all other statutes of New York involved upon this appeal are set forth in full in the appendix of statutes annexed to this brief.

1931 (par. 4, R., p. 4). The creditors of The Bank of United States, it is alleged, aggregate over 400,000 in number, and are scattered throughout the United States and foreign countries, and beyond the reach of process of the courts of New Jersey (par. 5, R., p. 5).

It is then alleged (par. 6, R., p. 5) that Article VIII, Section 7, of the Constitution of the State of New York provides as follows:

> "The stockholders of every corporation and joint-stock association for banking purposes, shall be individually responsible to the amount of their respective share or shares of stock in any such corporation or association, for all its debts and liabilities of every kind."

and that Section 120 of the New York Banking Law provides in part (par. 10, R., p. 7):

> "The rights, powers and duties of stockholders of banks shall be as prescribed in the general corporation law and the stock corporation law; but the individual liability of such stockholders for the contracts, debts, and engagements of the bank and the time within which an action may be instituted to enforce such liability shall be governed exclusively by the provisions of this section and section eighty of this chapter.
>
> "The stockholders of every bank shall be individually responsible, equally and ratably and not one for another, for all contracts, debts and engagements of the bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. An action to enforce such liability must be brought within six years after the cause of action has accrued. The term 'stockholder' as used in this section shall apply to:

"1. Such persons as appear by the books of the bank to be stockholders;

"2. Every owner of stock, legal or equitable, although the same may be on such books in the name of another person, * * *

"In case the superintendent of banks shall have taken possession of the property and business of the bank pursuant to section fifty-seven of this chapter * * *, all actions or proceedings to enforce the liability of stockholders under this section shall be taken and prosecuted only in the name of the superintendent * * *".

The complaint also sets forth the following provisions of Section 80 of the New York Banking Law (par. 7, R., p. 5):

"Whenever a liability of stockholders for the amount of their respective shares of any such corporation exists, and the superintendent has duly taken possession of the property and business of such corporation, and has duly notified creditors to present and make proof of their respective claims and the last day to present such claims has expired, and he has determined from his examination of its affairs that the reasonable value of the assets of such corporation is not sufficient to pay its creditors in full, he may enforce the individual liability of such stockholders in whole or in part. In case he determines to enforce such liability, he shall make demand in writing upon such stockholders by causing such demand to be enclosed in sealed envelopes addressed and mailed, postage prepaid, to said respective stockholders at their last known places of address as the same appear upon the stock ledger of such corporation or at their last known address if no address appears in said ledger. Such demand shall state the total amount assessed by the superintendent against the stockholders and the equal and

pro rata share assessed against each stockholder for each share of stock, and the total amount of such assessment for all the shares of stock of such stockholder. Such demand shall also fix a date, not earlier than thirty days from the date of such notice, upon which such stockholder shall be required to pay such assessment to the superintendent. In case any such stockholder shall fail or neglect to pay such assessment within the time fixed in said notice, the superintendent shall have a cause of action, in his own name as superintendent of banks, against such stockholder either severally or jointly with other stockholders of such corporation, for the amount of such unpaid assessment or assessments, together with interest thereon from the date when such assessment was, by the terms of said notice, due and payable. In any such action, the written statement of the superintendent, under his hand and seal of office, reciting his determination to enforce the individual liability, or any part thereof, of such stockholders, and setting forth the value of the assets of such corporation and the liabilities thereof, as determined by him after examination and investigation, shall be presumptive evidence of such facts as therein stated."

The complaint then alleges that subsequent to the 29th day of June, 1931, and prior to July 1, 1932, plaintiff, after an examination of its assets, determined and ascertained that the reasonable value of the assets of The Bank of United States was not sufficient to pay its creditors in full, and that there was due and owing by such bank to its depositors and creditors, for moneys received and due and unpaid upon deposit accounts, and other moneys owing for value received upon its contracts, debts and engagements, a sum in excess of $30,000,000 over and above the reasonable value of such assets; that such insufficiency as so fixed

and ascertained then existed and has since continued (par. 5, R., p. 5); and that subsequent to such determination, and prior to July 1, 1932, plaintiff decided that an assessment of $25 against each stockholder for each share of stock held by him was necessary to provide moneys toward the payment and satisfaction of the sums due and owing the creditors of such bank (par. 8, R., p. 6).

The complaint then alleges that thereafter and on or about July 1, 1932, plaintiff made demand in writing, a sample copy of which is annexed to the complaint (R., p. 10), upon all the stockholders of The Bank of United States appearing upon its stock ledger, for the payment on August 8, 1932 of $25 for each share of stock appearing upon such stock ledger to be held by each stockholder, which demand stated the total amount assessed by plaintiff against all of the stockholders, the equal and *pro rata* share assessed against each stockholder for each share of stock held by him, and the total amount of the assessment for all of the shares held by each such stockholder (par. 9, R., p. 6).

The concluding paragraphs of the complaint allege that on and prior to December 11, 1930 each of the defendants appeared and now appears upon the stock ledger of The Bank of United States as the owner and holder of the number of shares set opposite his respective name upon the schedule annexed thereto (par. 11, R., p. 8), and has failed to pay the assessment levied against him (par. 12, R., p. 8), and judgment is demanded for such sum together with interest from August 8, 1932 (R., p. 10).

The allegations of the "SECOND COUNT" (R., p. 9) are identical with the allegations of the "FIRST COUNT," except that they refer to certain equitable owners, and need not, therefore, be repeated at length.

Proceedings Below.

Defendants moved to dismiss plaintiff's complaint on the grounds that: (1) the complaint did not set forth a cause of action, (2) the liability alleged therein is unenforceable in New Jersey, and (3) that the laws of New Jersey prohibit the maintenance of the action in the Supreme Court (R., pp. 12-14).

Mr. Justice PARKER, sitting as a single Supreme Court justice, heard argument upon the aforesaid motion, and in his opinion based his decision on an Act of the Legislature of the State of New Jersey entitled, "A supplement to an act entitled 'An act concerning corporations' (Revision, 1896), approved April twenty-first, one thousand eight hundred and ninety-six," being Chapter 50, page 124, P. L. 1897, and designated in a pamphlet printed by the Secretary of State of New Jersey, and hereafter referred to, as Section 94b of the Corporation Act of New Jersey, which provides as follows:

> "2. No action or proceeding shall be maintained in any court of law of this state against any stockholder, officer or director of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country, and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this state other than in a nature of an equitable accounting for the proportionate

benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties.

"3. This act shall take effect immediately.
"Approved March 30, 1897."

The Court stated that the plaintiff:

"* * * comes over into this State and endeavors by a suit at law (or rather several hundred suits at law*) to recover the several amounts that he has himself assessed against the shareholders respectively. This seems to me to fly directly in the face of our statute" (referring to the statute above).

The Court concluded as follows:

"It would seem that there should be a judgment for the moving defendants subject of course to appeal, and without prejudice to the filing of a bill in equity on the lines laid down in section 94-b of the Corporation Act. The matter might be transferred to the Court of Chancery, but the complaint would have to be reframed, I think in any event" (Record, pp. 15-21).

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* This is a single action in which some 500 stockholders, representing all of the stockholders of record residing in New Jersey, are named as parties defendant. The liability of stockholders is, under Section 80 of the New York Banking Law, joint and several, and the cause of action arises out of a single assessment based upon an ascertained deficiency of one bank. There is, therefore, the essential community of interest to sustain the joinder, and since the cause of action against all of the defendants arises out of the same subject matter, this was obviously proper (P. L. of New Jersey, 1912, p. 378, §6 (1, 2)). The statement in the opinion that the action is several hundred suits at law is merely a statement of what the Supreme Court Justice considered to be the legal effect of the joinder.

The Court thereupon entered an order directing, not that the complaint be dismissed with leave to amend, or be transferred to equity, but that the complaint be struck out and that final judgment be entered in favor of each defendant. This order provides:

> "Ordered, that *judgment final* be entered in favor of each of said defendants and against said plaintiff, with costs to be taxed under the direction of this Court" (Record, pp. 21, 22).

Appellant appealed from the final judgment entered in the said Supreme Court on February 14, 1934 (R., pp. 23, 24) to the Court of Errors and Appeals of New Jersey, the court of last resort in that jurisdiction, upon specifications of error (R., pp. 25-29), similar to the following specifications of error urged upon the present appeal (R., pp. 33-39):

> (1) The judgment of the New Jersey Court of Errors and Appeals is erroneous because said judgment is based upon a finding that Chapter 50, P. L. 1897, page 124, Section 2, of the State of New Jersey, entitled "A Supplement to an act entitled 'An Act concerning corporations' (Revision, 1896)", is a bar to the maintenance of this action in the courts of law of the State of New Jersey, whereas said statute is null and void in that it is repugnant to Article IV, Section I, of the Constitution of the United States, providing:
>
> > "Full faith and Credit shall be given in each State to the Public Acts, Records and judicial Proceedings of every other State."
>
> (2) Because said judgment is based upon a finding that Chapter 50 of the Laws of 1897, page 124, Section 2, of the State of New Jersey, entitled "A Supplement to an Act entitled 'An act concerning corporations' (Revision, 1896)", is a bar to the maintenance of this

action in the courts of law of the State of New Jersey, whereas said statute is null and void in that it is repugnant to Article IV, Section 2, Paragraph 1, of the Constitution of the United States, and the Fourteenth Amendment, which provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several states."

(3) An Act of the Legislature of the State of New Jersey entitled, "A Supplement to an act entitled 'An act concerning corporations' (Revision, 1896)", as construed and applied by the New Jersey Supreme Court and Court of Errors and Appeals, closes the courts of New Jersey to plaintiff in enforcement of lawful contract rights as stated in the complaint, except under conditions so burdensome as to be impossible, and so expensive as to deprive plaintiff of his property in said contracts without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. Said statute is void and the judgment based thereon is erroneous.

(4) An Act of the Legislature of the State of New Jersey entitled, "A Supplement to an act entitled 'An Act concerning corporations' (Revision, 1896)," (P. L. 1897, Ch. 50) as construed and applied by the New Jersey Supreme Court and Court of Errors and Appeals, closes the courts of New Jersey to plaintiff in the enforcement of lawful contract rights as stated in the complaint and as provided by Article VIII, Section 7, of the Constitution of the State of New York, and Sections 120 and 80 of the New York Banking Law, in violation of Article IV, Section 1 of the Constitution of the United States.

(5) An Act of the Legislature of the State of New Jersey entitled, "A Supplement to an act entitled 'An

Act concerning corporations' (Revision, 1896)," (P. L. 1897, Ch. 50) as erroneously construed and applied by the New Jersey Supreme Court and Court of Errors and Appeals, closes the courts of New Jersey to plaintiff in the enforcement of lawful contract rights as stated in the complaint and as provided by Article VIII, Section 7, of the Constitution of the State of New York, and Sections 120 and 80 of the New York Banking Law, except under conditions so burdensome as to be impossible and so expensive as to deprive the aforementioned constitutional and statutory provisions of the State of New York of full faith and credit as required by Article IV, Section 1, of the Constitution of the United States.

(6) The judgment of the New Jersey Court of Errors and Appeals is null and void in that it is a general judgment against the plaintiff and in favor of the named defendants, and therefore a bar to any other action in any other court of New Jersey, or any other State, and is erroneous since the statute of New Jersey above expressly referred to does not purport to go further than a prohibition against an action at law in the courts of New Jersey, and does not justify a judgment concluding the appellant upon the merits of the cause of action.

(7) The judgment of the New Jersey Court of Errors and Appeals is erroneous in that it did not give full faith and credit to the public acts, records and judicial proceedings of the State of New York, within the intent and meaning of Article IV, Section 2, paragraph 1, of the Constitution of the United States, in that the complaint in the above entitled action sets forth as the basis of relief public acts and judicial proceedings of the State of New York within the intent and meaning of the Constitution of the United States. Said statute of the State of New Jersey, being con-

strued as prohibitive of said action, is void as repugnant to the section of the Constitution of the United States above referred to.

(8) Said statute of the State of New Jersey as construed and applied by the order and judgment of the Supreme Court, and the judgment of the Court of Errors and Appeals, is in violation of the Constitution of the United States, and particularly the Fourteenth Amendment thereof, and is therefore null and void.

(9) Said statute of the State of New Jersey, which would deny to the appellant any relief in the cause of action stated in the complaint, other than in the nature of an equitable accounting for the proportionate benefit of all parties interested, to which The Bank of United States and its legal representatives, and all of its creditors (aggregating over four hundred thousand in number), and all of its stockholders (aggregating over twenty thousand), shall be necessary parties, is so unreasonable and so burdensome as to be impossible of performance, by reason whereof said statute, as construed by the New Jersey Court of Errors and Appeals, deprives appellant of his property as Superintendent of Banks of the State of New York in assessments duly levied by him against stockholders of The Bank of United States residing in New Jersey, without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

The New Jersey Court of Errors and Appeals affirmed the judgment of the Supreme Court upon the opinion of Mr. Justice PARKER in the court of original jurisdiction (Record, pp. 29-31).

Appellant then sued out a writ of error to this Court, specifying as grounds of appeal the assignments of error above referred to, which was allowed by the presiding

Judge of the New Jersey Court of Errors and Appeals (R., pp. 31, 32), and probable jurisdiction was noted by this Court on ~~October~~ Dec. 3, 1934.

POINT I.

Section 94b of the New Jersey Corporation Act, and the final judgment of the Court below based thereon, deny to Article VIII, Section 7, of the Constitution of New York and Sections 80 and 120 of the New York Banking Law, and to the Public Act of the Superintendent of Banks of New York in levying an assessment against the stockholders of the Bank of United States pursuant thereto, the full faith and credit required under Article IV, Section 1, of the Constitution of the United States.

The measure of full faith and credit must be determined by reference to the statutes and decisions of the courts of the State of New York (*infra*, pp. 38 to 70).

We will therefore first discuss: (1) those provisions of the Constitution and the Banking Law of New York which provide that all stockholders of banks incorporated under the New York laws shall be liable for an assessment in addition to, but not exceeding in amount, the par value of their stock, *infra* pp. 14 to 17; and (2) the statutory method embodied in Sections 80 and 120 of the New York Banking Law of determining whether an assessment is necessary and the amount thereof, *infra* pp. 17 to 38; and continue with a discussion of the determinative questions of, (3) the extent to which such provisions of the New York Constitution and its Banking Law, and the levy of an assess-

ment against bank stockholders thereunder by the New York Superintendent of Banks, are entitled under the Constitution of the United States, to full faith and credit in jurisdictions other than New York, *infra* pp. 38 to 70; and (4) the manner in which Section 94b of the New Jersey Corporation Act, and the final judgment dismissing the complaint in this action, denies to the Constitution and statutes of New York and the official acts of the New York Superintendent of Banks thereunder in levying an assessment against the stockholders of The Bank of United States, that full faith and credit to which they are entitled under Article IV, Section 1, of the Constitution of the United States, *infra* pp. 71 to 82.

A.

Under Article VIII, Section 7, of the New York Constitution and Sections 120 and 80 of the New York Banking Law, as Interpreted by the New York Courts, All Stockholders of New York Banks Are Subject to a Statutory, Double Liability.

Specific imposition of an additional assessment liability of New York bank stockholders was first made in the Constitution of New York of 1846, Article VIII, Section 7. The Constitution of 1846 provided that all stockholders of banks issuing paper currency should be liable for an assessment in excess of their orginal subscriptions in the event of insolvency. Article VIII, Section 7, of the New York Constitution of 1846 was attacked as violative of the Constitution of the United States and sustained in *Matter of Oliver Lee & Co.'s Bank*, 21 N. Y. 9, affirmed by this Court *sub nom Sherman* v. *Smith*, 1 Black 587, 17 L. ed. 163. Subsequently and by the Constitution of New York of 1894, Article VIII, Section 7 was amended to read as follows:

"§7. *Liability of bank stockholders.*

"The stockholders of every corporation and joint-stock association for banking purposes, shall be individually responsible to the amount of their respective share or shares of stock in any such corporation or association, for all its debts and liabilities of every kind."

As so revised, this provision of the New York Constitution has continued, without change or modification, since that time. The liability created under this constitutional provision has been uniformly enforced by the New York courts [*Matter of Oliver Lee & Co.'s Bank*, 21 N. Y. 9; *Matter of Reciprocity Bank*, 22 N. Y. 9; *Matter of Hollister Bank*, 27 N. Y. 393; *Barnes* v. *Arnold*, 23 Misc. (N. Y.) 197, 51 N. Y. Supp. 1109, *aff'd* 45 App. Div. 314, 61 N. Y. Supp. 85, *aff'd* 169 N. Y. 611; *Hirshfeld* v. *Bopp*, 145 N. Y. 84; *Hirshfeld* v. *Fitzgerald*, 157 N. Y. 166; *Persons, et al.* v. *Gardner*, 26 Misc. (N. Y.) 663, 56 N. Y. Supp. 822, *aff'd* 42 App. Div. 490, 59 N. Y. Supp. 463; *Gause* v. *Boldt*, 49 Misc. (N. Y.) 340, 99 N. Y. Supp. 442; *aff'd* 115 App. Div. 897, 100 N. Y. Supp. 1117, *aff'd* 188 N. Y. 546; *Van Tuyl* v. *Scharmann*, 208 N. Y. 53; *Van Tuyl* v. *Robin*, 80 Misc. (N. Y.) 360, 142 N. Y. Supp. 535, *aff'd* 160 App. Div. 41, 145 N. Y. Supp. 121; *Van Tuyl* v. *Schwab*, 165 App. Div. 412, 150 N. Y. Supp. 786; *Van Tuyl* v. *Sullivan*, 156 N. Y. Supp. 309—not officially reported; *Skinner* v. *Schwab*, 188 App. Div. 457, 177 N. Y. Supp. 143, *aff'd* 229 N. Y. 549; *Broderick* v. *Aaron, et al.*, 264 N. Y. 368; *Broderick* v. *Normandie National Securities Corp.*, 240 App. Div. 409, 269 N. Y. Supp. 718, *aff'd* 265 N. Y. 98; *Broderick* v. *Adamson, et al.*, 148 Misc. (N. Y.) 353, 265 N. Y. Supp. 804; *Broderick* v. *Aaron, et al.*, 151 Misc. (N. Y.) 516, 272 N. Y. Supp. 219].

The New York courts have also discussed the nature of the assessment liability and have repeatedly held that it is not a statutory penalty, but a liability contractual in character (*Corning* v. *McCullough*, 1 N. Y. 47; *Cochrane* v. *Wiechers*, 119 N. Y. 399; *Lowry* v. *Inman*, 46 N. Y. 119; *Wiles* v. *Suydam*, 64 N. Y. 173; *Bailey* v. *Hollister*, 26 N. Y. 112; *Van Tuyl* v. *Schwab*, 174 App. Div. 665, 161 N. Y. Supp. 323, *aff'd* 220 N. Y. 661; *Howarth* v. *Angle*, 162 N. Y. 179, at 187; *Broderick* v. *Normandie National Securities Corp.*, 240 App. Div. 409, 269 N. Y. Supp. 718, *aff'd* 265 N. Y. 98; *Broderick* v. *Adamson* (*Dixon & Co.*), 240 App. Div. 279, 268 N. Y. Supp. 766). Describing the nature of the assessment contract, the New York Court of Appeals said, in *Lowry* v. *Inman*, 46 N. Y. 119:

> "A personal liability of stockholders for the debts of a corporation, in virtue of the charter, is not in the nature of a penalty or forfeiture, and does not exist solely as a liability imposed by statute. It is not enforced simply as a statutory obligation, but is regarded as voluntarily assumed by the act of becoming a stockholder. By such acts he assents to be bound, or that his property shall be charged with debts of the corporation, to the extent and in the manner prescribed by the act of incorporation."

This accords with the decisions of this Court (*Flash* v. *Conn*, 109 U. S. 371; *Hancock National Bank* v. *Farnum*, 176 U. S. 640; *Whitman* v. *National Bank of Oxford*, 176 U. S. 559; *Bernheimer* v. *Converse*, 206 U. S. 516; *Converse* v. *Hamilton*, 224 U. S. 243; *Selig* v. *Hamilton*, 234 U. S. 652; *Marin* v. *Augedahl*, 247 U. S. 142).

The terms of the assessment contract of National Bank stockholders were defined in *Deweese* v. *Smith*, 106 Fed.

438 (C. C. A. 8th), *aff'd sub nom Smith* v. *Brown*, 187 U. S. 637, as follows:

> "The liability of a shareholder of a national bank is contractual. It rests on his subscription for or his receipt and acceptance of his stock. By that act he agrees to be a shareholder of the bank, and to assume and discharge all the legal obligations and duties of such a shareholder. Bank *vs.* Hawkins, 174 U. S. 365, 370, 19 Sup. Ct. 739, 43 L. Ed. 1007. Upon familiar principles the acts of congress and the settled rules of law to which reference has been made are necessarily read into and become a part of every stockholder's contract. *The agreement of the shareholder with the bank and its creditors thus becomes a contract that, to an amount not exceeding the par value of his shares of stock, and not exceeding his equal and ratable proportion, he will pay, at such times and in such amounts as the comptroller of the currency shall decide to be necessary and shall demand, the debts and obligation of his bank,* Rev. St., Sections 5151, 5234; Kennedy *vs.* Gibson, 8 Wall. 498, 19 L. Ed. 476." (Italics ours.)

B.

Under Section 80 of the New York Banking Law, as Interpreted by the New York Courts, the Levy of an Assessment by the Superintendent of Banks is an Official or Public Act, and Conclusive in the Absence of Fraud, Bad Faith, or Clear Error of Law.

By New York Laws of 1914, Chapter 369, the present Section 80 of the New York Banking Law was enacted. Section 80 specifically provides that after the Superintendent:

> "* * * *has determined from his examination of its affairs* that the reasonable value of the assets of

> such corporations is not sufficient to pay its creditors in full, *he may enforce* the individual liability of such stockholders in whole or in part." (Italics ours.)

The statute then provides:

> "In case *he determines* to enforce such liability, he shall make demand in writing upon such stockholders by causing such demand to be enclosed in sealed envelopes addressed and mailed, postage prepaid to said respective stockholders at their last known places of address as the same appear upon the stock ledger of such corporation or at their last known address if no address appears in said ledger." (Italics ours.)

The statute then specifies the following terms of such demands:

> "Such demands shall state the total amount *assessed by the superintendent* against the stockholders and the equal and pro rata share assessed against each stockholder for each share of stock, and the total amount of such assessment for all the shares of stock of such stockholder. Such demand shall also fix a date, not earlier than thirty days from the date of such notice, upon which such stockholders shall be *required* to pay such assessment to the superintendent." (Italics ours.)

The statute then specifies the effect of failure by stockholders to comply with the notice of assessment and demand for its payment, in the following language:

> "In case any such stockholder shall fail or neglect to pay such assessment within the time fixed in said notice, *the superintendent shall have a cause of*

> *action,* in his own name as superintendent of banks, against such stockholder either severally or jointly with other stockholders of such corporation, *for the amount of such unpaid assessment or assessments, together with interest thereon from the date when such assessment was, by the terms of said notice, due and payable.*" (Italics ours.)

Thus, Section 80, specifically: (1) authorizes the Superintendent to examine into the reasonable value of the assets and the amount of the liabilities of banks in his possession for purposes of liquidation, and to decide whether or not an assessment is necessary and, if so, the amount thereof; (2) directs the Superintendent to issue a notice of his determination to levy the assessment and of the amount assessed by him, and to demand payment thereof in writing within a period not shorter than thirty days from the date of the notice; and (3) vests in the Superintendent a cause of action for the amount unpaid upon the due date of the demand, together with interest thereon from such due date. It is thus clear that the power to determine whether or not an assessment is necessary and to levy an assessment, is vested in the Superintendent.

It is universal doctrine that official action taken by executive officers pursuant to statutory authority is presumed to be valid, and may be reviewed by the courts only upon grounds of clear error of law, fraud, or bad faith (*Marbury* v. *Madison,* 1 *Cranch* (U. S.) 137; *Leland* v. *Cameron,* 31 N. Y. 115; *People* v. *Diamond,* 233 N. Y. 130; *In re Whitman,* 225 N. Y. 1; *Hirshfeld* v. *Craig,* 239 N. Y. 98; *Schiefflein* v. *Goldsmith,* 253 N. Y. 243; *People ex rel. Lieberman* v. *Vandecarr,* 175 N. Y. 440).

The revised New York Banking Law of 1914, which vested in the New York Superintendent of Banks the power

to take possession of and liquidate New York banks and to levy and enforce the assessment liability against their stockholders, was derived largely from the provisions of the National Banking Act.

In *Van Tuyl* v. *Scharmann,* 208 N. Y. 53, the Court pointed out that the scheme of the New York Banking Law with regard to the levy and enforcement of assessments conformed to the National Banking Act, saying:

> "*The same general plan prevails in the liquidation of national banks by the comptroller of the currency,* and the relief sought by the complaint in this action is similar to the relief which was theretofore obtained in proceedings authorized to be taken against stockholders of bank corporations to enforce the liability imposed upon them by article 8, section 7, Constitution of 1846 (Laws of 1849, chapter 226; Banking Law of 1882, chapter 409, article 6), and which was sustained by this court in *Matter of Empire City Bank* (18 N. Y. 199)." (Italics ours.)

In *Matter of Union Bank,* 176 App. Div. 477, 163 N. Y. S. 485, the Court pointed out:

> "The learned Special Term in its opinion quotes, as instructive as to the legislative change in functions of the superintendent, from messages of Govs. Odell and Higgins, and in the part quoted from Gov. Odell are these words, referring to banks and insurance companies:
>
> " 'They should be placed entirely under the control of the State Banking and Insurance Departments, and our laws should be made to conform to the federal statutes relating to national banks.'
>
> "Comparison of 13 U. S. Statutes at Large, pp. 114, 115, with our Banking Law, indicates that the Executive's recommendations were adopted."

In discussing the accrual of the cause of action in its relation to the statute of limitations and applying the rule of the Federal courts, Mr. Justice Lydon, in *Broderick* v. *Aaron, et al.*, 151 Misc. 516, 272 N. Y. Supp. 219, said:

> "The Banking Law of this state was amended and revised to conform generally our scheme of bank regulation, liquidation and assessment enforcement to the statutory system applicable to national banks conducted through the Comptroller of Currency (Matter of Union Bank, 204 N. Y. 313; Van Tuyl *v.* Scharmann, 208 N. Y. 53; see Report of the Commission on Banks, December, 1907; Report of Superintendent of Banks, 1908, Senate Document No. 6, 131 Session, page XXIX). The test of the accrual of the cause of action laid down by the federal courts should therefore control."

Under the National Banking Act the Comptroller of Currency is vested with the power to decide whether or not an assessment against National Bank stockholders is necessary. In view of the source of the revised New York Banking Law and its legislative assimilation to the National Banking Act, the decisions by the Federal courts upon the weight and effect to be given to the determination by the Comptroller of Currency are of special importance in ascertaining the effect of the similar determination by the New York Superintendent of Banks of the necessity of resorting to the assessment liability of stockholders of insolvent New York Banks.

In *Kennedy* v. *Gibson*, 75 U. S. 476, 8 Wall. 498, the following discussion of the effect to be given to the Comptroller's determination to levy an assessment appears:

> "It is for the comptroller to decide when it is necessary to institute proceedings against the stock-

holders to enforce their personal liability, and whether the whole or a part, and, if only a part, how much, shall be collected. *These questions are referred to his judgment and discretion, and his determination is conclusive.* The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper and upon such data as shall be satisfactory to him. This action on his part is indispensable whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver * * *." (Italics ours.)

The same result was reached in *Casey* v. *Galli*, 94 U. S. 673; *Germania National Bank* v. *Case*, 99 U. S. 628; *Studebaker* v. *Perry*, 184 U. S. 258. Referring to the numerous prior decisions of this court, Mr. Justice SANBORN said in *Deweese* v. *Smith*, 106 Fed. 438 (C. C. A. 8th), affirmed *sub nom*, *Smith* v. *Brown*, 187 U. S. 637:

> "The acts of congress confer the power and impose the duty upon the comptroller to determine within the statutory limit the amounts that shall be paid by each stockholder upon his individual liability, and the times when he shall pay these amounts. The liability of the shareholder does not mature—does not become due—until the comptroller adjudges it to be payable and demands it, and it falls due in such amounts and at such times as he decrees. Kennedy *vs.* Gibson, 8 Wall. 498, 505, 19 L. Ed. 476; U. S. *vs.* Knox, 102 U. S. 422, 425, 26 L. Ed. 216; Bank *vs.* Case, 99 U. S. 628, 634, 25 L. Ed. 448; Casey *vs.* Galli, 94 U. S. 673, 681, 24 L. Ed. 168; Bushnell *vs.* Leland, 164 U. S. 684, 685, 17 Sup. Ct. 209, 41 L. Ed. 598. . . .
>
> "The liability of a shareholder of a national bank is contractual. It rests on his subscription for or his

receipt and acceptance of his stock. By that act he agrees to be a shareholder of the bank, and to assume and discharge all the legal obligations and duties of such a shareholder. Bank *vs.* Hawkins, 174 U. S. 365, 370, 19 Sup. Ct. 739, 43 L. Ed. 1007. Upon familiar principles the acts of congress and the settled rules of law to which reference has now been made are necessarily read into and become a part of every stockholder's contract. *The agreement of the shareholder with the bank and its creditors thus becomes a contract that, to an amount not exceeding the par value of his shares of stock, and not exceeding his equal and ratable proportion, he will pay, at such times and in such amounts as the comptroller of the currency shall decide to be necessary and shall demand, the debts and obligations of his bank,* Rev. St., Sections 5151, 5234; Kennedy *vs.* Gibson, 8 Wall. 498, 19 L. Ed. 476." (Italics ours.)

Judge SANBORN also said, at page 445:

"Under the acts of congress and the decisions of the courts to which reference has been made the comptroller of the currency constitutes a quasi judicial tribunal, to whose exclusive determination congress has intrusted the decision in the first instance of the questions, what proportion of the full liability of the stockholder of an insolvent bank it is necessary to collect to pay its debts, and when this amount shall be paid. *His decisions of questions within his jurisdiction are, like the decisions of the land department and of the other quasi judicial tribunals, impervious to collateral attack, and open to avoidance by the Court only in a direct attack upon them on the grounds of clear error of law, fraud, or mistake.* U. S. *vs.* Knox, 109 U. S. 422, 425; 26 L. Ed. 216; U. S. *vs.* Northern Pac. R. Co., 95 Fed. 864, 870, 37 C. C. A. 290, 296; Bogen *vs.* Mortgage Co., 63 Fed. 192, 195

11 C. C. A. 128, 130, 27 U. S. App. 346, 350; U. S. *vs.* Winona & St. P. R. Co., 67 Fed. 948, 959, 15 C. C. A. 96, 107, 32 U. S. App. 272, 289." (Italics ours.)

It is therefore firmly established that the determination by the Comptroller of Currency of the necessity of an assessment, is binding and conclusive upon stockholders in the absence of fraud, bad faith, or clear error of law. As appears from the excerpts above quoted, this is but an application or extension of the underlying doctrine firmly embedded not only in the Federal cases, but also in the New York decisions above cited (*supra,* p. 19), that where a matter involving the exercise of judgment or discretion is properly delegated to executive officers, their official action is conclusive within the limitations already noticed.

It has been repeatedly held by the courts of New York that official action taken by the Superintendent in suspending a New York bank, in liquidating its assets and in determining to enforce the assessment liability of its stockholders, is entitled to the identical conclusive effect which attaches generally to official action of executive officers, in the absence of fraud, bad faith or clear error of law.

Thus in *Matter of Lunghino,* 176 App. Div. 285, 163 N. Y. Supp. 9, the Superintendent took possession of S. Lunghino & Sons, private bankers, who thereupon moved, under what is now Section 60 of the New York Banking Law, for an order ousting the Superintendent from possession. At Special Term an order was entered directing the Superintendent to surrender possession under the terms of a plan approved by the court, but not by the Superintendent. In reversing the order of the Special Term, the Appellate Division said:

"The appellant contends that the order of the court was entirely unauthorized, and that thereby the court assumed prerogatives with which the law did not invest it. We think the appellant is correct in such interpretation of the law. In the enactment of the Banking Law of the state, the Legislature adopted a well-defined scheme with reference to private bankers to bring them directly under the control and supervision of the Superintendent of Banks. He was the officer invested by the Legislature to pass upon the character, responsibility, and general fitness of the person seeking to engage in the business of private banking. The act (section 48) provides that, whenever the approval of the superintendent is made a condition precedent to the doing of any act, it shall lie within his sound discretion to grant or refuse his approval. *The Legislature having confided the decision of a matter of a public nature to a public official with discretionary power to act in the premises, acts properly within such discretion are not subject to judicial review at the instance of some one claiming that a different decision should have been made. Ontario Knitting Co.* v. *City,* 205 N. Y. 416, 98 N. E. 909." (Italics ours.)

In *Matter of Union Bank,* 176 App. Div. 477, 163 N. Y. Supp. 485, the Appellate Division reviewed an order of the Special Term directing the Superintendent to complete the liquidation of the Union Bank of Brooklyn upon a date fixed by the court. In reversing the order of the Special Term, the Appellate Division said:

"I think that the court overlooked a distinction between the superintendent as a liquidator, and a receiver appointed by the court, that excluded the former from the power of the court exercised in this instance. The former common-law right of banking

is now a franchise derived from the Legislature (Attorney General *v.* Utica Ins. Co., 2 Johns. Ch. 377; People *v.* Utica Ins. Co., 15 Johns. 378, 8 Am. Dec. 243), and the superintendent is the head of the deprtment for the state regulation of such franchise. He is not a part of the judicial branch of the government. He does not take his office nor derive any of his original powers from it. * * * He is a state officer. Article 1, § 2, Public Officers Law (Consol. Laws, c. 47); People *ex rel.* Baird *v.* Nixon, 158 N. Y. 221, 52 N. E. 1117. * * *

"* * * when the court undertook thus to order the superintendent as a liquidator, it reached out to direct a state officer in the discharge of statutory duties, involving discretion, conferred upon him, not the court, when he and not the court was in custody of the assets. Section 70, Banking Law.

* * * * * *

"As I have said, the liquidation contemplated and authorized by the Banking Law is not the result of any action or proceeding in court. Liquidation does not necessarily require nor imply judicial proceedings. The appointment of an officer to act in liquidation outside of judicial proceedings or apart from the judicial branch of the government is not open to objection as vesting him with judicial power. Title Guaranty Co. *v.* Allen, 240 U. S. 136; Bushnell *v.* Leland, 164 U. S. 684, 17 Sup. Ct. 209, 41 L. Ed. 598; In re Chetwood, 165 U. S. 458, 17 Sup. Ct. 385, 41 L. Ed. 782. See, too, Vil. of Saratoga Spgs. *v.* Saratoga G., etc., Co., 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713. * * * "

* * * * * *

"* * * It is not for the court to set itself above the judgment and discretion of administrative officers to whom the law commits a decision, for thereby

the court but confronts its opinion with his opinion. Morgan *v.* City of Binghamton, 102 N. Y. at 504. * * *"

In *Isaac* v. *Marcus,* 258 N. Y. 257, the Court held that the Superintendent's right to enforce the liabilities of directors for negligence and misfeasance was paramount, saying:

"The Superintendent of Banks, as we have said, is, in effect, a statutory receiver. He is not an officer of the court and he derives his powers from the fiat of the Legislature. The Legislature pursuant to its power to regulate banking and to create banking corporations, has provided that the Superintendent of Banks shall supersede the officers and stockholders of the corporation in the control of the corporate affairs. In him the Legislature has vested not only broad powers but broad discretion. * * *

* * * * * *

"* * * *The court may not substitute its discretion for his own where the statute leaves discretion to him.* * * *"* (Italics ours.)

To like effect see *Matter of Broderick,* 235 App. Div. 281, 257 N. Y. S. 382.

Broderick v. *Adamson, et al.,* 148 N. Y. Misc. 353, was the first action in New York to recover the assessment levied against the stockholders of The Bank of United States. It was in the nature of a test suit brought against a selected group of defendants. The record in that case shows that the defendants organized a protective committee which in turn retained accountants, and that the Superintendent extended the privilege to these accountants of examining the data and appraisals upon which his deter-

mination to levy a 100% assessment against the stockholders of The Bank of United States was based. The record also shows that upon the trial, the defendants were permitted, without objection by counsel for the Superintendent, to offer evidence of the value of the assets which they asserted contradicted the Superintendent's determination that the assessment was necessary. In rendering judgment in favor of the Superintendent, Mr. Justice LYDON said:

> "While the question was not presented upon the trial, it would seem appropriate, in view of the large body of litigation pending and prospective involving the enforcement of assessments against bank stockholders, to state my views with respect to the effect and weight to be given to the certificates provided for under section 80 of the Banking Law. It is my opinion that this certificate, in the absence of a showing of fraud, illegality, bad faith, or obvious error, constitutes conclusive evidence of the facts therein stated. This is the rule of the federal courts in actions to enforce the statutory liability of stockholders of national banks. Kennedy *v.* Gibson, 8 Wall. 498, 19 L. Ed. 476; Studebaker *v.* Perry, 184 U. S. 258, 22 S. Ct. 463, 46 L. Ed. 528, The National Banking Act (see 12 USCA § 21 et seq.) contains no provision similar to that of section 80, and the rule applied in the federal jurisdictions rests upon no positive statute but merely upon the presumption of good faith and regularity attending the performance of official acts. Isaac *v.* Marcus, 258 N. Y. 257, 179 N. E. 487; Matter of Broderick (Matter of Bank of Canastota), 235 App. Div. 281, 257 N. Y. S. 382; Matter of Lunghino & Sons, 176 App, Div. 285, 163 N. Y. S. 9. There is neither logic nor reason in the principle that the certificate of the superintendent

> may be overthrown upon the basis of mere differences of opinion between the superintendent and the experts and witnesses of the defendants in relation to reasonable values. The determination of the superintendent is essentially and peculiarly an administrative act resting upon the exercise of sound business judgment and discretion. Banking Law, § 80; Matter of Union Bank of Brooklyn, 176 App. Div. 477, 163 N. Y. S. 485. If not infected with bad faith or obvious error, or violative of any fixed legal principle, it should not be subject to attack upon the theory that the preponderance of evidence, in the opinion of the trier of the facts, indicates that the values as fixed by the superintendent are merely erroneous. Liquidation presupposes the prompt and speedy conversion of assets to cash in the interests of creditors, and the right to enforce and collect the assessment should not be subject to defeat by the mere balancing of the opposing opinions and views of expert witnesses upon the questions of reasonable values. If it should ultimately appear that the assessment was unnecessary in whole or in part, the stockholders are entitled to share in any remaining surplus (Banking Law, § 79). As between the stockholder and the creditor, it is the convenience of the latter that is preferred by the courts. * * *"

Broderick v. *American General Corporation, et al.*, 71 F. (2d) 864 (C. C. A. 4th) was an action by the New York Superintendent of Banks to enforce the assessment against stockholders of The Bank of United States residing in Maryland. In holding that the determination of the Superintendent of Banks was conclusive and that therefore his remedy was at law and not in equity, the Circuit Court of Appeals, in an opinion by PARKER, J., said:

"But in addition to this, we think that the certificate of the Superintendent of Banks, in the absence of attack on the ground of fraud, illegality, bad faith, or obvious error, is conclusive as to the necessity for the stock assessment. That assessment was made pursuant to the laws of New York. The stockholders in purchasing stock in a corporation of that state consented to the obligations imposed by its laws upon the ownership of such stock; and the effect of the assessment by the Superintendent of Banks and his certificate thereon is to be determined by reference to those laws. * * *

* * * * * *

"These statutes were adopted in 1908 after the banking troubles of the preceding year; and their purpose was to provide a plan for the liquidation of banks under a department of the state similar to that provided for national banks under the Comptroller of the Currency. Van Tuyl *v.* Scharmann, 208 N. Y. 53, 101 N. E. 779, 782; Broderick *v.* Aaron, 151 Misc. 516, 272 N. Y. S. 219. As said in the case last cited:

> " 'The banking law of this state was amended and revised to conform generally our scheme of bank regulation, liquidation and assessment enforcement to the statutory system applicable to national banks conducted through the comptroller of currency (Matter of Union Bank, 204 N. Y. 313, 97 N. E. 737; Van Tuyl *v.* Scharmann, 208 N. Y. 53, 101 N. E. 779; see Report of the Commission on Banks, December 1907; Report of Superintendent of Banks, 1908, Senate Document No. 6, 131 Session, page XXIX). The test of the accrual of the cause of action laid down by the federal courts should therefore control.'

"It is, of course, well settled that the decisions of the Comptroller of the Currency are conclusive as to the assessments levied against stockholders of insol-

vent national banks for the purpose of enforcing their statutory liability. Kennedy *v.* Gibson, 8 Wall 505; Studebaker *v.* Perry, 184 U. S. 258; Liberty Nat. Bank *v.* McIntosh (C. C. A. 4th), 16 Fed. (2d) 906, 909. In the case last cited, this court said:

> " 'The decisions of the Comptroller of the Currency are not subject to collateral attack, nor is his assessment against shareholders, and the amount thereof open to review; but, on the contrary, neither the bank nor the shareholders, clearly in the absence of fraud charged and proved, are entitled to a judicial determination of any question involved in his decision either as to the solvency, the sum due creditors and the amount of assessments as ordered, such matters one and all being exclusively within the judgment and discretion of the Comptroller, and as to which he acts in a quasi judicial capacity. Kennedy *v.* Gibson, *supra*, 75 U. S. 498, 19 L. Ed. 476; Casey *v.* Galli, 94 U. S. 673, 24 L. Ed. 168; United States *v.* Knox, 102 U. S. (12 Otto) 422, 26 L. Ed. 216; Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 238, 33 L. Ed. 564; Bushnell *v.* Leland, 164 U. S. 684, 17 S. Ct. 209, 41 L. Ed. 598; Hightower *v.* Bank, 263 U. S. 351, 44 S. Ct. 123, 68 L. Ed. 334; Deweese *v.* Smith (8th C. C. A.), 106 F. 438, 66 L. R. A. 971.'

"While the question here involved seems not to have been decided by the Court of Appeals of New York, it has been before the Supreme Court of that state in Broderick *v.* Adamson, 148 Misc. 353, 265 N. Y. S. 804, and the language of Mr. Justice Lydon in dealing with the question is convincing. • • •

"While this is not the expression of the highest court of the state in the interpretation of its statute, it is entitled to great weight, not only because it emanates from one of the courts of the state charged with the duty of applying the statute, but also because of

its appeal as being inherently reasonable and necessary. *The statute gives a cause of action for the amount of the assessment made against each stockholder, not for the amount which the court may deem necessary to meet the bank's indebtedness.*

"The Superintendent of Banks is authorized to determine himself the necessity for the assessment, not to bring an action to have the court determine it. He may sue the stockholders severally as well as jointly for the amounts due under the assessments levied; and surely it was not contemplated by the legislature that in each suit the court should wade through all the facts and figures involved in the bank's assets and liabilities to make the determination which the legislature had already authorized the Superintendent himself to make, with possibility of conflict between the decisions of different courts in different cases affecting stockholders of the same bank. It is said that the certificate of the Superintendent of Banks is made only presumptive evidence by the last sentence of Section 80; but we think that by this sentence it was intended to make clear that the certificate of the Superintendent should be accorded that presumption of correctness which attaches to official acts of administrative officers, not to detract from the strength of the presumption which would attach to it in the absence of statute. We think that the interpretation placed upon the statute by Mr. Justice LYDON is correct." (Italics ours.)

The decision of *Cheney* v. *Scharmann*, 145 App. Div. 456, 129 N. Y. Supp. 993 (1911), does not conflict with this conclusion. That case was decided under the Banking Law prior to its revision in 1914 under which it was provided merely that the Superintendent "may, if necessary to pay the debts of such corporation, enforce the individual liability of the stockholders." The former Banking Law

merely authorized the Superintendent to institute a law suit to enforce an assessment if necessary for the payment of creditors. The beginning of such a suit constituted merely the general assertion of a claim, the validity and merit of which were subject to judicial determination, similar to a claim brought by any private party. The initiation of the law suit by the Superintendent carried with it no presumptions or implications in aid of the validity of the claims asserted against the stockholders. Upon the trial, the Superintendent was bound to take the laboring oar and establish each and every element of his case by common law evidence, unaided by any presumptions in his favor. The court adopted the view that the Superintendent under this section of the old Banking Law was not authorized or empowered to determine the necessity of, or to levy the assessment, and no preliminary act or decision upon his part in any wise affected the ultimate liability of the stockholder. It is fair to say that the legislature largely because of this decision completely changed the authority of the Superintendent in relation to the levy and enforcement of the assessment by specifically conferring upon him the powers which were omitted from the earlier act. Under the present Section 80 enacted in 1914, and pursuant to which the present assessment was levied, the Superintendent determines the necessity of the assessment as an administrative act, and fixes the amount of such assessment and the date when the same shall become due and payable. Should the stockholder neglect to pay the amount of the assessment upon the date fixed, it is provided that the Superintendent shall have a cause of action in his own name against the defaulting stockholder and that interest shall accrue from the due date fixed in the notice or demand.

In other words, the necessity of the assessment is determined and the liability to pay arises prior to suit brought, in direct contradistinction to the language of the earlier statute considered in *Cheney* v. *Scharmann, supra.* Thus the Superintendent in an action brought subsequent to the enactment of Section 80, upon the trial is clothed with his official determination, which continues conclusive until attacked and overthrown upon the grounds already indicated. These considerations as well as those pointed out by PARKER, J. in *Broderick* v. *American General Corp., supra,* we submit sufficiently dispose of the contrary view expressed in *Broderick* v. *McGuire,* 119 Conn. 83, 174 Atl. 314, which will probably be relied upon by appellees.

Nor is that portion of Section 80 of the New York Banking Law providing that the Superintendent's certificate of the amount of the liabilities and the reasonable value of the assets of the bank, shall be presumptive evidence of the facts therein stated, opposed to our contention. The rule already fully discussed in this brief that official action pursuant to statutory authority is conclusive in the absence of fraud, bad faith or obvious error is commonly defined as a rule that official action is presumed to be valid in the absence of fraud, bad faith or obvious error. The New York decisions referred to, *supra,* pages 19, 24 to 29, as well as the decisions of this Court in relation to the levy of assessments by the Comptroller of Currency referred to, *supra,* pages 21 to 24, that the official levy is conclusive with exceptions already noted, is the identical principle incorporated in Section 80 of the New York Banking Law which provides that the certificate by the Superintendent of the necessity of the assessment shall be presumptive evidence of the facts therein recited. (*Broderick* v. *Adamson,*

et al., 148 N. Y. Misc. 353, 265 N. Y. Supp. 804; *Isaac* v. *Marcus*, 258 N. Y. 257; *People ex rel. Lieberman* v. *Vandecarr*, 175 N. Y. 440, 446; *People* v. *Diamond*, 233 N. Y. 130; *Matter of Broderick*, 235 N. Y. App. Div. 281; *Matter of Union Bank*, 176 N. Y. App. Div. 477; *Matter of Lunghino*, 176 N. Y. App. Div. 285; *Kennedy* v. *Gibson*, 75 U. S. 476; *Deweese* v. *Smith*, 106 Fed. 438, affirmed *sub nom Smith* v. *Brown*, 187 U. S. 637). Referring to this precise situation, the Court said, in *Broderick* v. *American General Corporation, et al.*, 71 Fed. (2d) 864 (C. C. A. 4th):

> "It is said that the certificate of the Superintendent of Banks is made only presumptive evidence by the last sentence of Section 80; but we think that by this sentence it was intended to make clear that the certificate of the Superintendent should be accorded that presumption of correctness which attaches to official acts of administrative officers, not to detract from the strength of the presumption which would attach to it in the absence of statute. We think that the interpretation placed upon the statute by Mr. Justice LYDON is correct."

It is equally well settled, both in relation to the New York Banking Law and the National Banking Act from which it was derived, that the delegation to the National Comptroller of Currency or the New York Superintendent of Banks of the power, quasi-judicial in nature, of determining whether or not an assessment is necessary, was proper. In *Bushnell* v. *Leland*, 164 U. S. 684, this Court said:

> "All these alleged errors may be reduced to the single contention that under the national banking law the comptroller of the currency is without power to appoint a receiver to a defaulting or insolvent

national bank, or to call for a ratable assessment upon the stockholders of such bank, without a previous judicial ascertainment of the necessity for the appointment of the receiver and of the existence of the liabilities of the bank, and that the lodgment of authority in the comptroller, empowering him either to appoint a receiver or to make a ratable call upon the stockholder, is tantamount to vesting that officer with judicial power in violation of the Constitution. All of these contentions have been long since settled, and are not open to further discussion. *Kennedy* v. *Gibson*, 75 U. S. 8 Wall. 498; *Casey* v. *Galli*, 94 U. S. 674; *United States* v. *Knox*, 102 U. S. 423. * * *"

In *Ex parte Chetwood*, 165 U. S. 443, it was pointed out:

"The receiver was appointed by the comptroller of the currency, January 14, 1889, and Chetwood commenced his suit * * * July 19, 1890. The receiver was not the officer of any court, but the agent and officer of the United States, as ruled by Mr. Justice GRAY, on circuit, in *Price* v. *Abbott*, 17 Fed. Rep. 506, and by Mr. Justice JACKSON, then circuit judge, in *Armstrong* v. *Trautman*, 36 Fed. Rep. 276. And see *Porter* v. *Sabin*, 149 U. S. 473, 470; *Platt* v. *Beach*, 2 Ben. 303; *Frelinghuysen* v. *Baldwin*, 12 Fed. Rep. 395; *Armstrong* v. *Ettlesohn*, 36 Fed. Rep. 209.

"It has been so often decided that the authority vested in the comptroller to appoint a receiver of a defaulting or insolvent national bank, or to call for a ratable assessment upon its stockholders, is not open to objection because vesting that officer with judicial power in violation of the Constitution that we have recently declined to re-examine that question."

In *Matter of Union Bank*, 176 App. Div. 477, 163 New York Supp. 485, the same view was announced.

The propriety of delegating to the Superintendent the power to levy and enforce assessments, although not expressly at issue, was sustained without discussion in *Van Tuyl* v. *Scharmann*, 208 N. Y. 53; *Van Tuyl* v. *Sullivan*, 156 N. Y. Supp. 309 (not officially reported); *Van Tuyl* v. *Lewis*, 165 App. Div. 865; *Broderick* v. *Aaron, et al.*, 264 N. Y. 368; *Broderick* v. *Normandie National Securities Corporation*, 265 N. Y. 98; *Broderick* v. *Adamson*, 148 Misc. 353; *Broderick* v. *Aaron*, 151 Misc. 516.

Summarizing the New York law with relation to the assessment liability of stockholders of New York banks, it appears (1) that the assessment liability created by Article VIII, § 7 of the New York constitution is contractual in nature under which stockholders agree to pay pursuant to the method of enforcement embodied in the banking law; (2) that under the banking law, the New York Superintendent of Banks is authorized to determine whether or not an assessment is necessary, the amount thereof and to levy such assessment, and that upon the failure of stockholders to respond to the Superintendent's levy and demand, he becomes possessed of a cause of action for its enforcement; (3) that the Superintendent's determination that an assessment is necessary and the amount thereof is conclusive in the absence of proof of fraud, bad faith, or clear error of law; and (4) that the delegation to the New York Superintendent of Banks of the power to levy assessments is valid.

We now turn to an examination of Article 4, Section 1, of the Constitution of the United States under which public acts, records and judicial proceedings of each State are entitled to full faith and credit in all other States, and the decisions of this Court applying that constitutional provi-

sion to statutes similar to the New York laws creating the assessment liability of New York stockholders and providing the method of its levy and enforcement.

C.

Under Article IV, Section 1, of the United States Constitution, New Jersey is required: (1) To permit enforcement against stockholders of New York banks residing in New Jersey of the assessment liability provided under Article VIII, Section 7, of the New York Constitution and Sections 80 and 120 of the New York Banking Law; and (2) To recognize the official determination by the New York Superintendent of Banks of the necessity of such assessment, made pursuant to the provisions of Section 80 of the New York Banking Law.

Article IV, Section 1, of the Constitution of the United States provides:

> "Full faith and credit shall be given in each state to the public Acts, Records and judicial Proceedings of every other State."

The business of large metropolitan banks such as The Bank of United States is nationwide. Its depositors are drawn from all parts of the country and include residents of many states other than New York. Similarly, stock of the larger banks of one state is held by investors throughout the country. The interests and property rights, which the assessment liability provided under the Constitution and statutory provisions of New York protects, are therefore not local to the state of domicile of the bank, but extend throughout the entire nation. The entire Federal Reserve Bank system rests upon the familiar principle that banks, as distinguished from ordinary businesses, are affected

with a nationwide public interest to which Congress has recently extended additional safeguards through legislation guaranteeing the payment of all deposits up to a specified amount.

It is apparent that in this situation the rights of creditors and the liabilities of stockholders may be effectively enforced only pursuant to the laws of the state which grants the charter of incorporation and fixes such rights and liabilities. Unmeasurable confusion and havoc would ensue if peculiar and local statutes and policies are permitted to supersede or nullify the laws of the state creating the corporation and upon which depositors rely in depositing their funds.

Ordinarily, the doctrine of comity, in its customary and enlightened application, affords sufficient protection without resort to the full faith and credit provisions of the Federal constitution. While under the cases hereafter considered the right was upheld on principles of comity it is quite evident that the same result would have been reached under the compulsion of the full faith and credit clause if a determination had been directly required thereunder. Referring to the doctrine of comity, in its direct relation to assessment of enforcement the court in *Pulsifer* v. *Greene*, 96 *Me.*, 438 said:

> "The double liability of the stockholders of the corporation was created for the benefit of its creditors. While it is not an asset of the corporation, adds nothing to its pecuniary resources, and is not available to or enforceable by the corporation itself, it does add to its commercial credit. It is enforceable by its creditors, and persons who contract with and give credit to the corporation may well be presumed to do so upon the faith of the liability of its

stockholders. It is elementary that every person who voluntarily becomes a stockholder in a corporation thereby agrees to the terms of its charter. The law which created the defendant's liability was a part of the same system of laws which permitted him and his fellow stockholders to be a corporation. It is to be read into its charter. The two go together. He cannot with one hand grasp the benefit, and with the other reject the burden. When he voluntarily became a stockholder in the Clyde Banking Company, incorporated under the laws of the state of Kansas, he must be held to have contracted with reference to, and have agreed to be bound by, the laws of that state, which entered into and formed a part of the constitution of the company. The obligation which he thereby assumed, though statutory in its origin, was contractual in its nature, and as such not local, but transitory. It goes with him wherever he goes, and is enforceable in any court of competent jurisdiction. This result, which we believe to be consonant with reason and natural justice, is sustained by the weight of authority. Childs *v.* Cleaves, 95 Me. 498, 50 Atl. 714; Whitman *v.* Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. ed. 587; Bank *v.* Baker, 176 Mass. 294, 57 N. E. 603; Howarth *v.* Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; Flash *v.* Conn, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. ed. 966; Paine *v.* Stewart, 33 Conn. 516; Bank *v.* Lawrence, 117 Mich. 669, 76 N. W. 105; Bell *v.* Farwell, 176 Ill. 489, 52 N. E. 346, 42 L. R. A. 804, 68 Am. St. Rep. 194; Ferguson *v.* Sherman, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622; Howell *v.* Manglesdorf, 33 Kan. 199, 5 Pac. 759; Mor. Priv. Corp. Secs. 869, 871, 874."

The impossibility of effective enforcement of the assessment if the right is denied by states other than the state of

incorporation to resort to their courts for that purpose was pointed out in *Lewisohn* v. *Stoddard*, 78 Conn. 575, at page 598, in the following language:

> "The United States are founded upon the principle of freedom of commercial intercourse between citizens of the several states. Corporations of one state are commonly admitted by comity to do business in others * * *. When, as is true of most corporations with a considerable capital, some of the shareholders are citizens of the state granting the incorporation, and the rest are citizens of other states, no action to compel the discharge of stockholders' liabilities for the benefit of creditors can be brought in any forum before which all parties in interest can be compelled to appear. Unless then such an action can be maintained in a state, of which all shareholders are not citizens, and in which they cannot all be personally served with process, *a fatal defect would exist in the American system of remedial procedure.* The courts of the United States would be as powerless as those of a state; for their jurisdiction *in personam* is also under the arrangement of Federal Judicial Districts measured by State lines." (Italics ours.)

It may be noted that New York accords to comity its most broad and liberal application (*Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 110, 111). Numerous jurisdictions have, without invoking either comity or constitutional mandate, generally permitted executive officers of other states to enforce assessments, and have recognized the conclusive effect of their determinations of the necessity of resorting to the assessment liability though it is obvious from the reasoning that these decisions are supported by either comity or full faith and credit, or both [*Gile* v. *Duke*, 5 F. (2d) 952

(C. C. A. 9th); *Hansen* v. *Soderberg,* 105 Wash. 255; *Hansen* v. *Harris,* 145 Ore. 487, 28 Pac. (2d) 649; *Duke* v. *Olson,* 240 Ill. App. 198; *Commissioner of Banks* v. *Prudential Trust Co.,* 242 Mass. 78; *Broderick* v. *American General Corporation,* 71 F. (2d) 864. See also, *Broderick* v. *Stephano,* 314 Pa. 408, 171 Atl. (Pa.) 582; *Broderick* v. *McGuire,* 119 Conn. 83, 174 Atl. (Conn.) 314]. Other jurisdictions have refused to permit enforcement of assessments levied under the laws of different states. In such situations, this Court has repeatedly held that under the full faith and credit clause of the United States Constitution such states must recognize and give effect to the laws of the state of incorporation.

The paramount necessity of giving national effect to the law of the state of incorporation in such situations is fully discussed in *Royal Arcanum* v. *Green,* 237 U. S. 531. In that case the following facts were involved:

The Supreme Council of Royal Arcanum, a fraternal beneficiary corporation organized under the laws of Massachusetts to establish a fund for the benefit of its members, was authorized under its charter to amend its laws and constitution. Pursuant to its constitution, a lodge was organized in New York State, and one, Green, a resident of New York, became a member of this lodge. At that time his assessment was fixed at $1.80 per month. Thereafter, the Supreme Council increased the assessment of all members in the same class as Green to $6.87 per month. Green paid the increased assessment under protest. An action was begun in Massachusetts by certain other members to vacate and set aside the increase of assessments on the ground that it was invalid and violative of contractual rights. The Massachusetts court held that, under the char-

ter of incorporation and the laws of Massachusetts applicable thereto, the increase was valid (*Reynolds* v. *Supreme Council,* 192 Mass. 160). Several years later, Green ceased to make payments as required by the amended by-laws, and instituted an action in New York to vacate the increased assessment as illegal and void. The defense of the society was that New York must give full faith and credit to the Massachusetts laws under which the fraternity was incorporated, and the increased assessment authorized. The New York Court of Appeals, however, followed its own precedents with regard to fraternal societies organized under the laws of the state of New York, and held "that a membership contract in a mutual benefit association, in which the member agrees to comply with the laws of the order 'now in force or that may hereafter be adopted', does not authorize a subsequent amendment of the by-laws without the members' consent if the effect to such amendment is to increase the rate of assessment or to reduce the amount of the benefit as fixed by the contract" (206 N. Y. 591). In reversing the judgment of the New York Court of Appeals, Mr. Chief Justice WHITE, speaking for this Court, said:

> "It is not disputable * * * that all the rights of the complainant concerning the assessment to be paid * * * had their source in the constitution and by-laws, and *therefore their validity could be alone ascertained by a consideration of the constitution and by-laws.* This being true, it necessarily follows that resort to the constitution and by-laws was essential unless it can be said that the rights in controversy were to be fixed by disregarding the source from which they arose, and by putting out of view the only considerations by which their scope could be ascertained. *Moreover, as the charter was a*

Massachusetts charter, and the constitution and by-laws were a part thereof, adopted in Massachusetts, having no other sanction than the laws of that state, it follows by the same token that those laws were integrally and necessarily the criterion to be resorted to for the purpose of ascertaining the significance of the constitution and by-laws. Indeed, the accuracy of this conclusion is irresistibly manifested by considering the intrinsic relation between each and all the members concerning their duty to pay assessments and the resulting indivisible unity between them in the fund from which their rights were to be enjoyed. The contradiction in terms is apparent which would rise from holding, on the one hand, that there was a collective and unified standard of duty and obligation on the part of the members themselves and the corporation, and saying, on the other hand, that the duty of members was to be tested isolatedly and individually by resorting not to one source of authority applicable to all, but by applying many divergent, variable, and conflicting criteria. In fact, their destructive effect has long since been recognized. *Gaines* v. *Supreme Council, R. A.*, 140 Fed. 978; *Supreme Council, R. A.* v. *Brashears*, 89 Md. 624, 73 Am. St. Rep. 244, 43 Atl. 866. *And from this it is certain that when reduced to their last analysis the contentions relied upon in effect destroy the rights which they are advanced to support, since an assessment which was one thing in one state and another in another, and a fund which was distributed by one rule in one state and by a different rule somewhere else, would in practical effect amount to no assessment and no substantial sum to be distributed.*

* * *

"In addition it was by the application of the same principle that a line of decisions in this court came to establish: first, *that the law of the state by which*

a corporation is created governs in enforcing the liability of a stockholder as a member of such corporation to pay the stock subscription which he agreed to make; second, *that the state law and proceedings are binding as to the ascertaining of the fact of insolvency and of the amount due the creditors entitled to be paid from the subscription when collected;* and third, that putting out of view the right of the person against whom a liability for a stockholder's subscription is asserted to show that he is not a stockholder, or is not the holder of as many shares as is alleged, or has a claim against the corporation which at law or equity he is entitled to set off against the corporation, or has any other defense personal to himself, a decree against the corporation in a suit brought against it under the state law for the purpose of ascertaining its insolvency, compelling its liquidation, collecting sums due by stockholders for subscriptions to stock and paying the debts of the corporation, in so far as it determines these general matters, binds the stockholder, although he be not a party in a personal sense, because by virtue of his subscription to stock there was conferred on the corporation the authority to stand in judgment for the subscriber as to such general questions. *Selig* v. *Hamilton,* 234 U. S. 652, 58 L. Ed. 1518, 34 Sup. Ct. Rep. 926; *Converse* v. *Hamilton,* 224 U. S. 243, 56 L. Ed. 749, 32 Sup. Ct. Rep. 415; *Bernheimer* v. *Converse,* 206 U. S. 516, 51 L. Ed. 1163, 27 Sup. Ct. Rep. 755; *Whitman* v. *National Bank,* 176 U. S. 559, 44 L. Ed. 587, 20 Sup. Ct. Rep. 477; *Hawkins* v. *Glenn,* 131 U. S. 319, 33 L. Ed. 184, 9 Sup. Ct. Rep. 739. . . .

"*The controlling effect of the law of Massachusetts being thus established and the error committed by the court below in declining to give effect to that law and in thereby disregarding the demands of the full faith and credit clause being determined,* we

come to consider whether the increase of assessment which was complained of was within the powers granted by the Massachusetts charter, or conflicted with the laws of that state. Before doing so, however, we observe that the settled principles which we have applied in determining whether the controversy was governed by the Massachusetts law clearly make manifest how inseparably what constitutes the giving of full faith and credit to the Massachusetts judgment is involved in the consideration of the application of the laws of that state, and therefore, as we have previously stated, *how necessarily the express assertion of the existence of a right under the Constitution of the United States to full faith and credit as to the judgment was the exact equivalent of the assertion of a claim of right under the Constitution of the United States to the application of the laws of the state of Massachusetts. We say this because, if the laws of Massachusetts were not applicable, the full faith and credit due to the judgment would require only its enforcement to the extent that it constituted the thing adjudged as between the parties to the record in the ordinary sense, and on the other hand, if the Massachusetts law applies, the full faith and credit due to the judgment additionally exacts that the right of the corporation to stand in judgment as to all members as to controversies concerning the power and duty to levy assessments must be recognized, the duty to give effect to the judgment in such case being substantially the same as the duty to enforce the judgment.* • • •

"Coming, then, *to give full faith and credit to the Massachusetts charter of the corporation and to the laws of that state to determine the powers of the corporation and the rights and duties of its members,* there is no room for doubt that the amendment to the by-laws was valid if we accept, as we do, the

significance of the charter and of the Massachusetts law applicable to it as announced by the supreme judicial court of Massachusetts in the Reynolds Case. And this conclusion does not require us to consider whether the judgment *per se* as between the parties was not conclusive in view of the fact that the corporation, for the purposes of the controversy as to assessments, was the representative of the members. (See *Hartford L. Ins. Co.* v. *Ibs*, this day decided (237 U. S. 662, 35 Sup. Ct. Rep. 692).) Into that subject, therefore, we do not enter" (237 U. S., p. 531). (Italics ours.)

In the subsequent case of *Modern Woodmen of America* v. *Mix*, 237 U. S. 544, the beneficiary of a certificate issued by the fraternal society brought an action to recover because of the disappearance of the insured for more than ten years. The society was incorporated in Illinois, the certificate issued in South Dakota, and the action instituted in Nebraska. After the certificate had been issued, the by-laws of the society were amended to prohibit collection under certificates, even after long absence of the member, until the full term of the member's expectancy of life had expired. In Illinois the validity of the amendment was sustained (296 Ill. 104). The Nebraska court held that this amendment was unreasonable, and allowed recovery (111 Neb. 334). In reversing, this Court, in an opinion written by Mr. Justice HOLMES, said:

"The indivisible unity between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced, and the consequence that their rights must be determined by a single law, is elaborated in *Supreme Council, R. A.* v. *Green*, 237 U. S. 531, 542, 59 L. Ed. 1089, 1100,

L. R. A. 1916A, 771, 35 Sup. Ct. Rep. 724. *The act of becoming a member is something more than a contract,—it is entering into a complex and abiding relation,—and as marriage looks to domicile, membership looks to and must be governed by the law of the state granting the incorporation.* * * * It does not matter that the member joined in another state. In the above cited case Green became a member of a Massachusetts corporation in New York, and the state court held on ordinary principles of contract that his rights were governed by New York law. *Green* v. *Supreme Council, R. A.*, 206 N. Y. 591, 597, 100 N. E. 411. But the decision was reversed, and *it was held a failure to give full faith and credit to the Massachusetts charter as construed by the Massachusetts court that Green was relieved by decree from paying assessments increased by the corporation after his contract was made.* We are of opinion that the decision in that case governs this, and that the judgment must be reversed." (Italics ours.)

The decisions of this Court in *Whitman* v. *National Bank of Oxford*, 176 U. S. 559 and *Hancock* v. *Farnum*, 176 U. S. 640, decided in 1900, are of particular significance in relation to Section 94B of the New Jersey Corporation Act here involved and enacted in 1897. Both involved the right to recover additional liabilities of stockholders of Kansas corporations under the provisions of Article XII, Section 2, of the Constitution of Kansas of 1859 and the General Statutes of Kansas of 1868, Chapter 23, Section 32, *et seq.* Under the Kansas Constitution, stockholders of Kansas corporations other than railroad, religious or chartible corporations were made personally liable to creditors of such corporations to an amount equal to the par value of their stock. Section 32 of the Kansas Statutes of 1862 pro-

vided that if upon the levy of any execution upon a judgment against any such corporation there cannot be found property upon which to levy, then the creditor "may proceed by action to charge the stockholders with the amount of his judgment." Attempts to enforce this liability met with great resistance in jurisdictions other than Kansas (*Marshall* v. *Sherman*, 148 N. Y. 9; *New Haven Horse Co.* v. *Linden Spring Co.*, 142 Mass. 349; *Post* v. *R. R. Co.*, 144 Mass. 341; *Bank of North America* v. *Rindge*, 154 Mass. 203; *Fowler* v. *Lamson*, 146 Ill. 472. See also *May* v. *Black*, 77 Wisc. 101; *Nimick* v. *Mingo Iron Works Co.*, 25 W. Va. 184; *Hancock National Bank* v. *Farnum*, 20 R. I. 466; *Rice* v. *Merrimack Hosiery Co.*, 56 N. H. 114). In *Marshall* v. *Sherman*, 148 N. Y. 9, decided in 1895, it was held that a Kansas statute providing for enforcement of the assessment for the benefit of a single creditor and against a single stockholder, who is thereby subjected to liability to the full par value of his stock without prior ascertainment by accounting or otherwise in the original jurisdiction of his pro rata liability was unreasonable and oppressive and would not be recognized in New York.*

In 1897, the supplement to the New Jersey Corporation Act, the validity of which is here involved, was enacted (*supra*, p. 7). It was evidently the purpose of this sec-

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* The views expressed in *Marshall* v. *Sherman*, 148 N. Y. 9, are largely modified by the subsequent decision in New York of *Howarth* v. *Angle*, 162 N. Y. 179, and New York recognizes and permits enforcement of assessments levied under the laws of other states [*Shipman* v. *Treadwell*, 200 N. Y. 472; *Royal Trust Co.* v. *Harding*, 155 App. Div. (N. Y.) 104; *Stratton* v. *Bertles*, 238 App. Div. (N. Y.) 87, 263 N. Y. Supp. 466; *Pacific Co.* v. *Opolinsky*, 135 Misc. (N. Y.) 265; *Union Guardian Trust Co.* v. *Broadway National Bank*, 138 Misc. (N. Y.) 16; *Matter of Gordon*, 149 Misc. (N. Y.) 765, 269 N. Y. Supp. 235].

tion to p vent creditors of insolvent Kansas corporations or creditors of corporations of other states having similar statutory provisions from pursuing stockholders of such corporations residing in New Jersey, and who otherwise might, under the Kansas statutes, be compelled to bear the entire burden of the insolvency or seek contribution from their co-stockholders residing in other jurisdictions. Litigation in New Jersey under the Kansas statutes is shown by the decision of *Western National Bank* v. *Reckless*, 96 Fed. 70 (D. C. N. J., 1899). There the Court held that since the New Jersey statute was enacted subsequent to the creation of the indebtedness in favor of the particular plaintiff, it did not apply, and that therefore the creditor of the Kansas corporation could sue at law in the Federal Court of New Jersey and obtain judgment pursuant to the Kansas statutes. In this opinion it was also intimated that if Section 94b were construed so as to apply to debts already contracted, it would violate that provision of the United States Constitution which prohibits states from impairing the obligations of contracts. It would thus appear that the New Jersey statute was not intended to apply to enforcement of assessments by public officers acting in a fiduciary capacity for the benefit of all creditors after due ascertainment of the deficiency, and who are enjoined by provisions similar to those of Sections 80 and 120 of the New York Banking Law to levy and enforce such assessments equally and ratably against the stockholders. This was urged below and rejected by the New Jersey courts. This resume of the history and background of Section 94b is, however, of importance, since Section 94b embodies in statutory form the basic views expressed in the Rhode Island decision of *Hancock National Bank* v. *Farnum*, 20 R. I. 466, and the

contentions of the appellants in *Whitman* v. *National Bank of Oxford,* 176 U. S. 559, and which were rejected by this Court under the full faith and credit clause of the United States Constitution.

Thus, *Whitman* v. *National Bank of Oxford,* 176 U. S. 559, was an action by the National Bank of Oxford against Whitman, a citizen of New York, instituted in the Federal Court for the Southern District of New York, upon an indebtedness of $2,000 due from the City Investment Corporation, a Kansas corporation of which the defendant was a stockholder. Judgment was awarded the plaintiff in the District Court and was affirmed in the Circuit Court of Appeals, and on a writ of certiorari the case came before this Court. Counsel for the appellant stressed the decision of *Marshall* v. *Sherman,* 148 N. Y. 9, and contended that the liability was purely statutory, was peculiar to Kansas, and that therefore the remedy provided by the Kansas statute under which a single judgment creditor could pursue a single stockholder for satisfaction of his unpaid judgment was not available in jurisdictions other than Kansas (p. 562). In rejecting this contention and sustaining the judgment of the Court below, this Court said:

> "Whatever else may be said about the remedy, it is direct, certain, and available to every creditor of a corporation, and leaves to the stockholders the adjustment between themselves of their respective individual shares of the corporate obligations. In view of the present tendency to carry on business through corporate instrumentalities and the freedom from personal liability which attends ordinary corporate action, it cannot be said that this limited additional remedy is open to judicial condemnation.

> "The liability which by the Constitution and statutes is thus declared to rest upon the stockholder, though statutory in its origin, is contractual in its nature. It would not be doubted that if the stockholders in this corporation had formed a partnership, the obligations of each partner to the others and to creditors would be contractual, and determined by the general common law in respect to partnerships. If Kansas had provided for partnerships with limited liability, and these parties, complying with the provisions of the statute, had formed such a partnership, it would also be true that their obligations to one another and to creditors would be contractual, although only in the statute was to be found the authority for the creation of such obligations. And it is none the less so when these same stockholders organized a corporation under a law of Kansas, which prescribed the nature of the obligations which each thereby assumes to the others and to the creditors. While the statute of Kansas permitted the forming of the corporation under certain conditions, the action of these parties was purely voluntary. In other words, they entered into a contract authorized by statute."

Hancock National Bank v. *Farnum*, 176 U. S. 640, was also an action by a creditor of an insolvent Kansas corporation, against a stockholder residing in Rhode Island. The Rhode Island court sustained a judgment of the court of original jurisdiction, entered upon motion, dismissing the complaint (20 R. I. 466). Plaintiff thereupon sued out a writ of error to this Court. In reversing the decision and remanding the case for further proceedings to the Rhode Island court, this Court held:

> "It remains to be determined whether the action of the supreme court of Rhode Island in failing to

recognize the right which, in the case just referred to, we have held that the plaintiff possessed, is one which can be revised by this proceeding in error. In order to give this court jurisdiction of a case decided in the courts of a state there must be some question arising under the Constitution of the United States; some alleged denial of a right or immunity secured by that Constitution. The plaintiff says that the decision of the supreme court of Rhode Island denied it a right given by §1, article 4, of the Constitution of the United States, which reads: 'Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof,' and the following statute passed in pursuance thereof, to wit, Revised Statutes, §905.

"'The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.'

"The plaintiff's contention that these Federal provisions required a decision different from that

made by the state court was distinctly presented and ruled against. The jurisdiction, therefore, of this court, is clear. * * *"

"The Constitution declares that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and that Congress may not only prescribe the mode of authentication, but also the effect thereof. Section 905 prescribes such mode, and adds that the 'records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United Sattes as they have by law or usage in the courts of the state from which they are taken.' Such is the congressional declaration of the effect to be given to the records and judicial proceedings of one state in the courts of every other state. *In other words, the local effect must be recognized everywhere through the United States.*"

* * * * * *

"Now, as the judgment rendered in the Kansas court is in that state not only conclusive against the corporation, but also binding upon the stockholder, it must, in order to have the same force and effect in other states of the Union, be adjudged in their courts to be binding upon him, and the only defenses which he can make against it are those which he could make in the courts of Kansas. *The question to be determined in this case was not what credit and effect are given in an action against a stockholder in the courts of Rhode Island to a judgment in those courts against the corporation of which he is a stockholder, but what credit and effect are given in the courts of Kansas in a like action to a similar judgment there rendered. Thus and thus only can the full faith and credit prescribed by the Constitu-*

tion of the United States and the act of Congress be secured.'' (Italics ours.)

The Kansas *statutes* provided that an unsatisfied judgment against the corporation gives rise to a cause of action against any stockholder of the corporation to compel payment of the judgment. This decision required that Rhode Island give full faith and credit to the Kansas *statutes* by according to the judgment recovered against the corporation the same force and effect in Rhode Island as that provided for under the Kansas statutes. Rhode Island was not therefore compelled to give full faith and credit to a judgment entered in Kansas against the Rhode Island stockholder of the Kansas corporation, as appellees contended below, but to accord to the judgment against the corporation that force and effect declared by the statutes of the state of Kansas (*Royal Arcanum* v. *Green, supra; Modern Woodmen of America* v. *Mixer, supra*). Under the Kansas *statute,* as we have already shown, the judgment creditor was given a cause of action against any stockholder to obtain satisfaction of his unpaid judgment. This Court said that "• • • the local effect"—in other words, the effect of a judgment against a Kansas corporation in Kansas and under the Kansas statutes—"must be recognized everywhere throughout the United States. • • • Thus and thus only," this Court held, "can the full faith and credit prescribed by the Constitution of the United States and the act of Congress be secured." *Hancock* v. *Farnum* is authority, therefore, not only for the proposition that all states must permit enforcement of additional stockholders' liabilities created by the laws of other states, but also that the effect of the statutory provisions of Kansas establishing the liability of the stockholder and declaring

the circumstances and conditions under which such liability shall arise must be applied and given full faith and credit in any action or proceeding instituted by the creditor in a foreign state. It is equally apparent that Section 94b of the New Jersey Corporation Act under consideration here, applied to the situation presented in *Hancock* v. *Farnum, supra,* would deprive the Kansas statutes of that full faith and credit required under the United States Constitution and the decision by this Court of *Hancock* v. *Farnum.*

Thereafter, *Hale* v. *Allinson,* 188 U. S. 56, and *Finney* v. *Guy,* 189 U. S. 335, relied upon below by appellees, and involving extra-territorial enforcement of assessments provided by Minnesota statutes, were decided by this Court. These decisions sustained the denial of the right to enforce the assessment in jurisdictions other than Minnesota, but solely on the ground that the receivers had no title to or right to enforce the assessment in Minnesota under the Minnesota law, and therefore could have no greater right to enforce the assessment in any other jurisdiction.

Subsequently and by General Laws of Minnesota of 1899, Chapter 272, receivers or creditors of insolvent Minnesota corporations were authorized to petition the Minnesota court for a determination of whether an assessment was necessary. The Minnesota court was authorized to give such notice of the hearing as it deemed proper in its discretion. The statute then provided that upon the hearing the court could take evidence, by affidavit or otherwise, of the insolvency of the corporation and fix the liability of its stockholders for an assessment. After ascertaining the amount of the assessment chargeable against stockholders, the court was directed to order the receiver to demand payment of such assessment, and upon failure of

the stockholders to pay, to institute action in Minnesota or any other jurisdiction for its enforcement. Section 5 of the Minnesota statutes above referred to, which is set forth in *Bernheimer* v. *Converse*, 206 U. S. 516, and *First National Bank* v. *Converse*, 200 U. S. 424, at page 428, provided:

> "Sec. 5. *Said order and the assessment thereby levied shall be conclusive upon and against all parties liable upon or on account of any stock* or shares of said corporation, *whether appearing or represented at said hearing, or having notice thereof or not*, as to all matters relating to the amount of and the propriety of and necessity for the said assessment. This provision shall also apply to any subsequent assessment levied by said court as hereinafter provided." (Italics ours.)

Referring to this statutory procedure for ascertaining and determining whether an assessment was necessary, Mr. Justice CLARKE, in a dissenting opinion in *Marin* v. *Augedahl*, 247 U. S. 142, discussed numerous Minnesota decisions and pointed out:

> "The order was entered in a special statutory proceeding of a character such that the supreme court of Minnesota has declared that it is intended to be '*summary and without formal pleadings* and not controlled by all the forms usually incident to judicial procedure,' Finch, Van Slyck, & McConville & Vanasek, 132 Minn. 9, 12, 155 N. W. 754. The hearing in such cases is upon 'such notice as it (the court) deems proper' by publication or otherwise to be given; upon the hearing the court 'shall receive and consider such evidence *by affidavit or otherwise* as may be presented by the receiver, or by any

creditor, officer, or stockholder appearing in person or by attorney;' and the statute expressly provides that:

"'Such order shall be conclusive as to all matters relating to the *amount, propriety, and necessity* of the assessment, against all parties therein adjudged liable upon, or on account of, any stock or shares of such corporation, whether appearing or being represented at the hearing or not, or having notice thereof or not.' Minn. Gen. Laws 1899, chap. 272.

"That the conclusive character of the order entered in such a proceeding has been strictly confined by the Minnesota supreme court to the respects in which the statute just quoted declares it shall be conclusive, leaving all other defenses open to the stockholder, is shown by the following decisions:

"The act in force when the order now under discussion was entered was passed in 1899, and in the following year the supreme court of Minnesota sustained its constitutionality in Straw & E. Mfg. Co. *v.* L. D. Kilbourne Boot & Shoe Co., 80 Minn. 125, 83 N. W. 36, a case cited with approval by this court in both the *Bernheimer* case, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755, and *Converse* case, 224 U. S. 243, 56 L. ed. 749, 32 Sup. Ct. Rep. 415, Ann. Cas. 1913D, 1292. It was there held as follows:

"'Although the court inquires into the amount of the liabilities as well as to what will probably be realized out of the assets, *its sole determination is* that it is necessary and proper that an assessment of a given amount shall be levied against each share of stock. *That, and that only, is the ultimate issuable fact to be found by the court.*

"'The plain purport of §§3 and 5 is that after an order of assessment has been duly made, and the

receiver has sued an alleged stockholder to recover upon the assessment, the order cannot be attacked in that action upon the ground that the assessment was unnecessary or excessive, or upon the ground that the defendant was not actually a party to, or personally notified of, the hearing upon which the assessment was made. . . .

"'But, as we have heretofore intimated, the stockholders are not concluded in all respects by the determination of the court, nor is that the fair meaning of chapter 272, §5. A person sued as *a shareholder may show,* if he can, *that he is not a shareholder at all, or that he is not the holder of so large an amount of stock as is alleged,* or that he has discharged his liability, or that he has a claim against the corporation which he may, in law or equity, set off against the claim or judgment in assessment, *or he may make any other defense which is personal to himself.*'

"Again, in its latest construction of the act, in 1916, in Finch, Van Slyck & McConville *v.* Vanasek, *supra,* the court uses this language:

"'It was intended by the statute that the proceeding should be summary and without formal pleadings, and it is not controlled by all the forms usually incident to judicial procedure. *The court* under the statute deals in the main with probabilities, and *is not authorized to determine any fact, other than that of insolvency and the amount of the assessment to be made,* which in any way precludes the stockholders in a subsequent action brought to enforce the assessment. *The assessment is but preliminary to such an action, and therein the stockholders may present all matters that may be available to them in defense.* Straw & E. Mfg. Co. *v.* L. D. Kilbourne Boot & Shoe Co., *supra*'" (pp. 158, *et seq*).

This discussion of the character of the Minnesota proceeding does not conflict with the majority opinion, where it is pointed out that "*Besides* being a court of general jurisdiction, both at law and in equity, the court making the order had full jurisdiction of that suit" (p. 146).

Bernheimer v. *Converse*, 206 U. S. 516, was an action by a receiver of an insolvent Minnesota corporation appointed pursuant to the revision of 1888 above referred to against various stockholders of the insolvent Minnesota Thresher Mfg. Company residing in New York. Judgment was entered against the stockholders who sued out a writ of error to this Court. The stockholders contended that when they originally acquired their stock the laws of 1888 had not as yet been enacted and that under the prior Minnesota statutes, as interpreted in *Finney* v. *Guy* and *Hale* v. *Allinson*, above referred to, actions to enforce the assessment could be brought only by way of a bill in equity in Minnesota and not by a receiver in any other jurisdiction. The stockholders contended that in providing the new method of enforcing the assessment the Minnesota statute increased their contractual obligation as stockholders and was therefore invalid under the Constitution of the United States prohibiting the impairment of contracts. The stockholders also contended that the statute was unconstitutional in that it provided for a final and conclusive determination of the necessity of the assessment against stockholders residing in states other than Minnesota and over whom the Minnesota Court could obtain no jurisdiction. In overruling these contentions and sustaining the judgment below, this Court, in an opinion written by Mr. Justice Day, first pointed out:

> "It may be regarded as settled that, upon acquiring stock, the stockholder incurred an obligation

> arising from the constitutional provision, contractual in its nature, and, as such, capable of being enforced in the courts not only of that state, but of another state and of the United States (Whitman *v.* National Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477), * * *"

The Court then proceeded to dispose of the objections of the defendant stockholders as follows:

> "It is said that the stockholder is held liable in a proceeding to which he is not a party. Under the prior act he could only be held where service could be had upon him personally, but, if we are right in the proposition just announced, that additional remedies may be provided by legislation, then the validity of such additional enactments depends not necessarily upon the personal service upon the stockholders, *but upon the fact whether the remedy provided is a well-recognized means of enforcing such obligations, and not in violation of constitutional rights.* It is true that the stockholder is not necessarily served with process in the action wherein the assessment is made under the act of 1899, but no personal judgment is rendered against him in that proceeding, and it has reference to a corporation of which he is a member by virtue of his holding stock therein, and the proceeding has for its purpose the liquidation of the affairs of the corporation, the collection and application of its assets and other liabilities which may be administered for the benefit of creditors. In such case it has been frequently held that the representation which a stockholder has by virtue of his membership in the corporation is all that he is entitled to. It was so held in a well-considered case in Massachusetts (Howart *v.* Lombard, 175 Mass. 570, 49 L. R. A. 301, 56 N. E.

888). And it has been held in cases in this court that when an assessment is necessary to be made upon unpaid stock subscriptions for the benefit of creditors, the court may make the assessment without the presence or personal service of stockholders. Hawkins *v.* Glenn, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; Great Western Teleg. Co. *v.* Purdy, 162 U. S. 329, 336, 40 L. ed. 986, 990, 16 Sup. Ct. Rep. 810."

* * * * * *

"It is sought to distinguish between the Massachussets case of Howarth *v.* Lombard, *supra*, and kindred cases, and the one at bar, in the fact that when the stock was acquired in that case a statutory provision was already in existence which made the stockholder liable to an assessment in a proceeding in which the stockholder was represented by the corporation. *But, as we have said, keeping within the constitutional measure of liability, it was within the power of the legislature of Minnesota to make provisions, within the limits of due process of law, for the liquidation of the affairs of the corporation in a proceeding in the state of its origin, wherein members of the corporation should be sufficiently represented by the presence of the corporation itself. This practice has the sanction of the courts, as we have already shown. It is substantially the procedure authorized by the national banking act, except that the Comptroller of the Currency takes the place of the court, and, without the presence of the stockholders, makes a conclusive assessment. We cannot find any constitutional right belonging to the stockholder which is violated by this change in the character and nature of the remedy against him.*

"By becoming a member of a Minnesota corporation, and assuming the liability attaching to such

> *membership, he became subject to such regulations as the state might lawfully make to render the liability effectual.*" (Italics ours.)

The next case of interest is *Converse* v. *Aetna National Bank*, 212 U. S. 565. That was an action by the receiver of the same insolvent Minnesota corporation involved in *Bernheimer* v. *Converse, supra*, against various stockholders residing in Connecticut. The Connecticut Court sustained a judgment dismissing the complaint (79 Conn. 603) on the ground that the proceedings in Minnesota were not conclusive upon stockholders residing in Connecticut and on the further ground that the Minnesota statute was invalid under the Federal Constitution as impairing the obligation of contracts. The following is the complete *Per Curiam* opinion of this Court:

> "Judgments reversed with costs, on the authority of Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755, and cases remanded for further proceedings in conformity to law."

Thereafter, *Converse* v. *Hamilton*, 224 U. S. 243, came before this Court upon writ of error to the Supreme Court of the State of Wisconsin. That was also an action by the receiver of the same insolvent Minnesota corporation involved in *Bernheimer* v. *Converse, supra*, against various of its stockholders residing in Wisconsin. The Wisconsin Court entered judgment dismissing the complaint (136 Wisc. 589; 136 Wisc. 594). It is interesting to note that in the dissenting opinion in *Converse* v. *Hamilton*, 136 Wisc. 589, the dissenting Justice pointed out that a statute effecting a result identical with that reached by the Court would undoubtedly be unconstitutional under the full faith and credit clause of the United States Constitution.

In reversing the judgment of the Wisconsin Court and remanding the case for further proceedings, the Court first pointed out:

> "Of course, we must look to the Minnesota Constitution, statutes, and decisions to determine the nature and extent of the liability in question, and the effect given in that state to the laws and judicial proceedings therein looking to its enforcement, * * *."

The Court then reviewed the Minnesota statutes already referred to extensively, *supra*, and held:

> "The constitutional validity of chapter 272 has been sustained by the supreme court of the state, as also by this court; and this because (1) the statute is but a reasonable regulation of the mode and means of enforcing the double liability assumed by those who become stockholders in a Minnesota corporation; (2) while the order levying the assessment is made conclusive, as against all stockholders, of all matters relating to the amount and propriety of the assessment and the necessity therefor, one against whom it is sought to be enforced is not precluded from showing that he is not a stockholder, or is not the holder of as many shares as is alleged, or has a claim against the corporation which, in law or equity, he is entitled to set off against the assessment, or has any other defense personal to himself, and (3) while the order is made conclusive as against a stockholder, even although he may not have been a party to the suit in which it was made, and may not have been notified that an assessment was contemplated, this is not a tenable objection, for the order is not in the nature of a personal judgment against the stockholder, and as to him is amply sustained by

the presence in that suit of the corporation, considering his relation to it and his contractual obligation in respect of its debts. Straw & E. Mfg. Co. *v.* L. D. Kilbourne Boot & Shoe Co., *supra;* London & N. W. American Mortg. Co. *v.* St. Paul Park Improv. Co., 84 Minn. 144, 86 N. W. 872; Bernheimer *v.* Converse, *supra.*

"This statement of the nature of the liability in question, of the laws of Minnesota bearing upon its enforcement, and of the effect which judicial proceedings under those laws have in that state, discloses, as we think, that in the cases now before us the supreme court of Wisconsin failed to give full faith and credit to those laws and to the proceedings thereunder, upon which the receiver's right to sue was grounded."

* * * * * *

"True, the full faith and credit clause of the Constitution is not without well-recognized exceptions, as is pointed out in Huntington *v.* Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; Andrews *v.* Andrews, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237, and National Exch. Bank *v.* Wiley, 195 U. S. 257, 49 L. ed. 184, 25 Sup. Ct. Rep. 70; but the laws and proceedings relied upon here come within the general rule which that clause establishes, and not within any exception. Thus, the liability to which they relate is contractual, not penal. The proceedings were had with adequate jurisdiction to make them binding upon the stockholders in the particulars before named. *The subject to which chapter 272 is addressed is peculiarly within the regulatory power of the state of Minnesota; so much so that no other state properly can be said to have any public policy thereon.* And what the law of Wisconsin may be respecting the relative rights and obligations of credi-

tors and stockholders of corporations of its creation, and the mode and means of enforcing them, is apart from the question under consideration.

"In these circumstances we think the conclusion is unavoidable that the laws of Minnesota and the judicial proceedings in that state, upon which the receiver's title, authority, and right to relief were grounded, and by which the stockholders were bound, were not accorded that faith and credit to which they were entitled under the Constitution and laws of the United States." (Italics ours.)

The next case of importance upon the question at issue is *Selig* v. *Hamilton*, 234 U. S. 652, also arising under the Minnesota assessment statutes. In that case the defendant had transferred his stock some time prior in September, 1904, whereas the corporation was not declared insolvent until September of 1905. The defendant contended that the proceedings taken in Minnesota to ascertain the deficiency did not bind him since they applied only to persons who were stockholders when insolvency intervened. In overruling this contention the Court, in an opinion by Mr. Justice HUGHES, pointed out that under the Minnesota statute stockholders remain liable, even though they have transferred their stock, for all debts contracted while they were stockholders and unpaid when insolvency intervened. The Court pointed out that the petition filed in the Minnesota proceedings and the order entered thereon covered the liability of the defendant, and held:

"It follows that if the court, thus having jurisdiction, and acting upon the evidence before it in the statutory proceeding, assessed former stockholders for the purpose of providing for debts incurred while they held their stock, its determination

with respect to the amount of the assessment and the necessity therefor must be deemed conclusive. These questions cannot be reopened in another court when the receiver sues to collect the amount of the assessment. The stockholder in such a suit is free to urge his personal defenses, but this does not mean that he may resist the receiver's demand upon the ground that the assessment was not needed. *The marshalling of the amounts recovered from stockholders is also the appropriate subject for the consideration of the court which, under the statute, collects and distributes the fund. It is quite obvious that another court, in an action by the receiver against the stockholder, could not undertake to fix the amount required to pay the debts for which the stockholder is liable unless it virtually assumed the duty imposed by the statute of determining what a ratable assessment should be, and thus denied due credit to the determination already made in a court of competent jurisdiction.*" (Italics ours.)

The Court concluded that if any error had been made in the order assessing the defendant, the only remedy for the defendant lay in an application to the Minnesota Court for its correction and not by way of collateral attack in other jurisdictions.

These Minnesota statutes again came before this Court in *Marin* v. *Augedahl*, 247 U. S. 142. That was an action at law in North Dakota by a receiver of an insolvent Minnesota corporation to enforce against one of its stockholders residing in North Dakota an order of the Minnesota Court levying an assessment. The North Dakota Court held that the corporation, of which defendant was a stockholder, came within the exceptions of the Minnesota statute with regard to corporations whose stockholders are liable for assess-

ments and dismissed the action. In reversing the North Dakota judgment, this Court held:

> "Under these circumstances, the order is entitled, under the Constitution and laws of the United States, to the same faith and credit in the courts of North Dakota as by law or usage are given to such an order in the courts of Minnesota. Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; Converse *v.* Hamilton, 224 U. S. 243, 56 L. ed. 749, 32 Sup. Ct. Rep. 415, Ann. Cas. 1913D, 1292. In Minnesota, as before said, it is conclusive of all matters relating to the propriety of the assessment, including the questions of the character and insolvency of the corporation, and therefore it should have been held similarly conclusive in North Dakota. The court of that state declined to regard it as determining the character of the corporation, and so failed to give it the faith and credit to which it is entitled."

Thus these decisions, like the decision of *Hancock* v. *Farnum, supra,* require states other than the state of incorporation not only to permit enforcement of assessment liabilities created by the laws of the state of incorporation, but also to recognize and give full force and effect to the statutory provisions of the state of incorporation for ascertaining and determining whether the assessment was necessary and the amount thereof. In each of these cases stockholders residing in states other than Minnesota contended that they could not be bound by the order of the Minnesota court, entered without personal service upon them, and which, under the Minnesota statutes, was made conclusive and binding upon them even though they had received no notice of the proceeding and had not appeared or been

represented at the hearing. But these contentions were consistently and repeatedly overruled.

In the court below, appellees construed these cases merely as a holding that courts of states other than the State of Minnesota were required to give full faith and credit to judicial proceedings in Minnesota. It was argued that this is different from the obligation to recognize and enforce an assessment levied by a public officer pursuant to the statutes of a different state. The attempted distinction is without merit. Obviously, if the extra-territorial force of the orders of the Minnesota court was predicated exclusively upon the application of the full faith and credit clause of the United States Constitution to judgments, the orders independent of the statutes upon which they were founded would have been invalid in jurisdictions other than Minnesota because of the absence of personal service in Minnesota upon the stockholders affected (*Pennoyer* v. *Neff*, 95 U. S. 714).

Indeed the order or decree of the Minnesota court was largely administrative in character. This is shown by the remarks of Mr. Justice Clarke in his dissenting opinion to *Marin* v. *Augedahl*, 247 U. S. 142, and quoted *supra*, page 57, and to like effect, see *Matter of Bank of Winslow*, 36 Ariz. 507, 287 Pac. 444. This is also recognized by the decisions of this Court in *Kennedy* v. *Gibson*, 75 U. S. 476; *Casey* v. *Galli*, 94 U. S. 673; *United States* v. *Knox*, 102 U. S. 422; *Bushnell* v. *Leland*, 164 U. S. 684; and *In re Chetwood*, 165 U. S. 443. In those cases it was contended by stockholders of national banks that the transfer of the power to suspend banks and determine the necessity of and levy assessments against national bank stockholders, formerly exercised by the courts as a so-called judicial

function, constituted an invalid delegation to an executive officer of powers judicial in nature. But in the decisions above referred to, this contention was specifically overruled. Thus, in *In re Chetwood,* 165 U. S. 443, this Court said:

> "It has been so often decided that the authority vested in the comptroller to appoint a receiver of a defaulting or insolvent national bank, or to call for a ratable assessment upon its stockholders is not open to objection because vesting that officer with judicial power in violation of the Constitution, that we have recently declined to re-examine that question."

The same view was taken by the New York courts in *Matter of Union Bank,* 176 App. Div. 477, 163 N. Y. Supp. 485.

In the final analysis, the *ex parte* order of the Minnesota court is identical with the quasi-judicial determination of the New York Superintendent of Banks and of the comptroller of currency to levy assessments. The right, in each case, is founded upon the jurisdiction of the state of incorporation over the corporate entity and the general power of the legislature to regulate and provide for the enforcement of liabilities of members of corporations organized under the laws of the respective jurisdiction. Finally, under *Royal Arcanum* v. *Green,* 237 U. S. 531, *supra,* p. 42, and *Modern Woodmen of America* v. *Mixer,* 267 U. S. 544, *supra,* p. 47, it is clear that in this situation the full faith and credit clause requires states other than the state of incorporation to recognize and give effect to the statutes of the state of incorporation which govern the rights and liabilities of stockholders.

D.

The requirement of Section 94b that the assessment may only be enforced through an accounting in an action initiated by a bill in equity denies to the determination by the New York Superintendent that conclusive effect which attaches to such determination under the laws of New York.

Section 94B of the New Jersey Corporation Act, the validity of which is involved upon this appeal and which was applied by the Court below in entering final judgment dismissing the complaint, provides as follows:

> "2. No action or proceeding shall be maintained in any court of law of this state against any stockholder, officer or director of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, *if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country;* and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this state other than in a nature of an *equitable accounting* for the proportionate benefit of all parties interested, *to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties.*
>
> "3. This act shall take effect immediately. Approved March 30, 1897." (Italics ours. P. L. 1897, c. 50.)

Thus, Section 94b requires the Superintendent to institute an action in New Jersey in the nature of an "equitable accounting" for the proportionate benefit of all parties interested in order to recover the assessment from New Jersey stockholders of New York banks. The statute plainly requires the Superintendent to submit to the New Jersey Court an accounting of his stewardship of the assets of the bank, a statement of all of its liabilities and all of its assets and an appraisal of the reasonable value of such assets upon the basis of which the New Jersey Chancery Court may make an accounting for the purpose of ascertaining whether an assessment is necessary and the amount thereof; and this was the holding of the Court below.

The decisions by this Court in *Whitman* v. *National Bank of Oxford*, 176 U. S. 559 and *Hancock* v. *Farnum*, 176 U. S. 640, establish that Section 94b is violative of both the full faith and credit and due process clauses of the Constitution. Thus, in the cases above referred to, creditors of insolvent Kansas corporations were attempting to enforce in a foreign state a statutory liability of the stockholders of such corporations for its debts and liabilities.

In *Hancock* v. *Farnum, supra*, this Court held that the remedy provided under the Kansas statute by which a judgment creditor was given the right to seek payment of his unsatisfied judgment against any stockholder of the insolvent Kansas corporation was a clear right which must be recognized under the full faith and credit clause of the Constitution in other jurisdictions. Had a judgment creditor of an insolvent Kansas corporation sought to enforce his claim in New Jersey after the enactment of Section 94b in 1897, he would have been compelled to surrender his rights under the Kansas statute to pursue a single stock-

holder for his unpaid judgment and to institute an action for an equitable accounting in New Jersey for the proportionate benefit of all parties interested and to join as necessary parties the Kansas corporation and its legal representatives, if any, and all of its creditors and all of its stockholders. But this Court held in *Hancock* v. *Farnum* that all states must give the same force and effect to the right of creditors of insolvent Kansas corporations against their stockholders as is given in Kansas under the laws of Kansas. Under the express holding in that case the creditor of the Kansas corporation has the right to rely in New Jersey upon the conclusive effect of his judgment declared by the Kansas statute and to recover against any of the stockholders of the Kansas corporation residing in New Jersey. It is therefore clear that the decision of this Court in *Hancock* v. *Farnum* and the provisions of Section 94b of the New Jersey Corporation act are irreconcilable and the latter must yield.

Again, in *Bernheimer* v. *Converse*, 206 U. S. 516; *Converse* v. *Aetna National Bank*, 212 U. S. 565; *Converse* v. *Hamilton*, 224 U. S. 243; *Selig* v. *Hamilton*, 234 U. S. 652 and *Marin* v. *Augedahl*, 247 U. S. 142, this Court required other states to give full faith and credit to *ex parte* orders of Minnesota courts levying assessments against stockholders of insolvent Minnesota corporations, which orders were, under Minnesota statutes, binding and conclusive upon all stockholders whether resident or non-resident. Had the receivers in those cases commenced actions against stockholders residing in New Jersey, Section 94b, if valid, would require abandonment of the order of the Minnesota court and the institution of a new accounting proceeding in New Jersey, to which the Minnesota corporations and all of its

creditors and stockholders would be necessary parties, for a re-ascertainment of the necessity of the assessment. Obviously, the decisions of this Court above referred to and the provisions of Section 94b are in direct conflict.

Thus Section 94b nullifies the official determination of the necessity of the assessment made by the Superintendent of Banks pursuant to Section 80 of the Banking Law. Under Section 94b, he is required to commence an equitable proceeding in New Jersey for the purpose of obtaining a judicial re-ascertainment upon the question of whether the assessment is necessary and, if so, the amount thereof. Just as in the situations presented in *Hancock* v. *Farnum*, 176 U. S. 640, and in *Converse* v. *Hamilton*, 224 U. S. 243, the decisions of the State Courts deprived the statute in the state of the domicile of the corporation of full faith and credit, so Section 94b deprives the New York statutes and the public act of the New York Superintendent of Banks pursuant thereto, of the full faith and credit to which they are entitled under the United States Constitution.

E.

The conditions imposed by Section 94b upon the enforcement of such assessment constitute a denial of the right of the Superintendent to resort to the Courts of the State of New Jersey to recover upon the assessment liability of stockholders of New York banks residing in New Jersey and thus violates the full faith and credit and due process clauses of the United States Constitution (Constitution, Art. IV, §1, XIVth Amendment).

Under Section 94b, the Superintendent may recover upon the assessment in New Jersey only in an action for an equitable accounting "to which such corporation and

its legal representatives, if any, and *all of its creditors* and *all of its stockholders* shall be *necessary* parties." Under this statute, the Superintendent is required to join as a party defendant a New York banking corporation which never conducted business in New Jersey, more than 400,000 depositors and creditors of The Bank of United States, residing in almost every state throughout the Union and in foreign countries (*Comp.*, par. 5, R., p. 5), and an additional 20,000 stockholders of The Bank of United States all of whom are non-residents of New Jersey (*Comp.*, par. 2, R., p. 3). These persons are, under the statute, "necessary parties" to the action. Obviously, it is impossible to effect personal service of the summons and complaint in New Jersey upon the vast bulk of these necessary parties. It is equally obvious that jurisdiction cannot be obtained in New Jersey over the stockholders and creditors of The Bank of United States who never resided in or owned any property in New Jersey. The foundations of jurisdiction are familiar and well-settled, and all attempts to effect service upon non-residents not conducting business or owning property in New Jersey through the medium of publication or other forms of substituted service, have been repeatedly rejected by the New Jersey courts and by this Court (*Pennoyer* v. *Neff*, 95 U. S. 714; *Wilson* vs. *Am. Palace Car Co.*, 65 N. J. Eq. 730; *Sielcken* v. *Sorenson*, 109 N. J. Eq. 397; *Papp* v. *Metropolitan Life Ins. Co.*, 113 N. J. Eq. 522; *Puster* v. *Parker Mercantile Co.*, 70 N. J. Eq. 771; *Cameron* v. *Penn Mutual Life Ins Co.*, 111 N. J. Eq. 24; *Lanning* v. *Twining*, 71 N. J. Eq. 573; *Fraxam, etc. Corp.* v. *Skouras, etc. Corp.*, 113 N. J. Eq. 512). The term "necessary parties" defines those parties whose presence in an action is essential as a jurisdictional

prerequisite to the entry of judgment (*Wilkinson* v. *Dodd*, 40 N. J. Eq. (13 Stew.), 123; *In re Martin*, 86 N. J. Eq. 265; *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33; *Ex parte Equitable Trust Co.*, 231 Fed. 571; U. S. v. *Allen*, 179 Fed. 13; *Leonard* v. *Pierce*, 182 N. Y. 431; *Mahoney* v. *Bernhardt*, 27 N. Y. Misc. 339; *Phoenix National Bank* v. *Cleveland Co.*, 58 Hun (N. Y.) 606; *Jones* v. *Bryant*, 204 Ill. App. 609; *Chandler* v. *Ward*, 188 Ill. 322; *Tatum* v. *Roberts*, 59 Minn. 52; *Hyams* v. *Dominion Co.*, 113 Me. 337; *Rosina* v. *Trowbridge*, 20 Nev. 105; *Sexton* v. *Sutherland*, 37 N. D. 500; *State* v. *Municipal Savings and Loan Co.*, 111 Ohio St. 178; *Burrell* v. *Garst*, 19 R. I. 38). In *Wilkinson* v. *Dodd*, 40 N. J. Eq. (13 Stew.) 123, the Court quoted with approval the following definition of necessary parties appearing in *Bailey* v. *Inglee*, 2 Paige 278:

> "• • • 'Persons are necessary parties when no decree can be made respecting the subject matter of litigation until they are before the court • • •'" (p. 130).

Thus, Section 94b prohibits and precludes enforcement of the assessment in New Jersey (*Hancock* v. *Farnum*, 176 U. S. 640; *Whitman* v. *National Bank of Oxford*, 176 U. S. 559, *Bernheimer* v. *Converse*, 206 U. S. 516, *Converse* v. *Aetna National Bank*, 212 U. S. 565, *Converse* v. *Hamilton*, 224 U. S. 243, *Selig* v. *Hamilton*, 234 U. S. 652, *Marin* v. *Augedahl*, 247 U. S. 142, *Royal Arcanum* v. *Green*, 237 U. S. 531, and *Modern Woodmen of America* v. *Mixer*, 267 U. S. 544).

Even assuming that under Section 94b it is not necessary to effect personal service upon or obtain jurisdiction

in New Jersey over the some 400,000 non-resident depositors and creditors and 20,000 non-resident stockholders of The Bank of United States and that substituted service would suffice, the statute remains arbitrary and unreasonable, and therefore unconstitutional. It would still remain necessary under the statute to name these non-resident depositors and creditors and stockholders as parties to the action. We have not precisely calculated the expense of printing a document of the encyclopedic proportions required by the statute, but it would obviously be tremendous. It would also be necessary to effect personal service upon every creditor and depositor of the bank residing in New Jersey. The Sheriff would have to return process *non est inventus* as to each non-resident defendant. Chapter 88, P. L. of New Jersey, 1922, page 164, entitles the Sheriff to a fee of $1.50 for making an affidavit of non-residence of a defendant. In the present case this fee would aggregate over $600,000, or more than the amount involved in this suit. The Superintendent would then be compelled to make applications for leave to effect substituted service on all of such defendants, approximately 420,000 in number, and present the essential facts showing the necessity therefor. This would require in addition to the return of the Sheriff an affidavit setting forth the residence or place of business of each defendant (N. J. Chancery Rules, 36-38). It is impossible rationally to conceive of compliance with such conditions or to calculate the expense and difficulties of offering such evidence. In addition to the fees of the Sheriff the expense of mailing is to some extent indicated by the fact that a three-cent stamp alone on 420,000 notices would cost some $12,600. This represents an insignificant item compared with the expense entailed in printing such notices,

typing names and addresses of the some 420,000 persons to whom they would have to be mailed, and effecting their mailing. Again, assuming that a direction for the publication of the notice was made by the New Jersey courts we have reasonably calculated that the printed names of the 420,000 non-resident defendants would fill at least eighty newspaper pages of eight columns each. Under the New Jersey Chancery Act, it would be necessary to publish the notice to all absent defendants during four consecutive calendar weeks, at least once a week (P. L. 1912, C. 155, §13; N. J. Chancery Rules, 36-38). Thus the expense of compliance with the various requirements of the statute would exceed the amount sought to be recovered in this action. Finally, to conduct to judgment a litigation against such a vast defendant population, exceeding in number all but comparatively few cities of the United States, and of some States presents an undertaking quite beyond human performance. The inevitable deaths, bankruptcies and other devolutions of interest, and consequent substitution of parties would constitute a practical bar to the trial of the action.

Nor can any rational, logical or reasonable object be accomplished by such a preposterous proceeding. The creditors of The Bank of United States have ample opportunity under the New York Banking Law, as interpreted by the New York courts, to protect their interests in the liquidation of the bank and the enforcement of the assessment liability of its stockholders (*Isaac* v. *Marcus, et al.*, 258 N. Y. 257; New York Banking Law, §120). Any creditor feeling himself aggrieved by neglect or misconduct of the Superintendent may, through proceedings in the New York tribunal having jurisdiction over the Superintendent of

Banks, obtain the necessary relief (*Isaac* v. *Marcus, supra*). Obviously, the New York tribunal, where all of the records of the liquidation and the assessment enforcement proceedings are filed (New York Banking Law, §§60, 62-4, 66, 69, 71-6, 78-9), is the only tribunal able to protect the interests of creditors and stockholders in the liquidation. Moreover, an examination of the decisions in *Broderick* v. *Adamson, et al.*, 148 Misc. (N. Y.) 353, and *Broderick* v. *Aaron, et al.*, 151 Misc. (N. Y.) 516, in which actions the assessment was reduced to judgment against more than 10,000 stockholders of the bank residing in New York, and *Broderick* v. *Stephano, et al.*, 314 Pa. 408, 171 Atl. (Pa.) 582, and *Broderick* v. *American General Corporation, et al.*, 71 F. (2d) 864, permitting enforcement of the assessment against the stockholders residing in Pennsylvania and Maryland, shows the utter futility of joining such stockholders in the New Jersey proceedings.

There is therefore no basis, in reason or logic, for the requirements of Section 94b, which was evidently enacted for the sole purpose of barring and prohibiting enforcement of assessments in New Jersey. Indeed, the statute has already been an effective weapon in preventing such proceedings by executive officers and judicial receivers of other jurisdictions who have been denied recovery in New Jersey and who have had insufficient at stake to raise the question of the constitutionality of Section 94b before this Court of last resort (*Cochrane* v. *Morris, et al.*, 10 N. J. Misc. 82).

If New Jersey by its statute may compel the New York Superintendent of Banks as a *sine qua non* to recovery from stockholders resident therein to commence an action in the Court of Chancery for an accounting to which action The Bank of United States and all of its stockholders and all

of its creditors shall be necessary parties, then we may confidently expect all states (other than those which provide for double liability upon stockholders of banks) to pass similar laws.

We may certainly look forward to the day in coming generations when banks will be much larger than the great Bank of United States, and when such actions as this must be brought in every state and possession of the United States. The practical effect of such laws, if valid, will be to deny recovery of the shareholders' liability outside the state of domicile of the corporation.

It is a well-established rule that an arbitrary and unreasonable statute which, in its necessary operation, nullifies the full faith and credit clause of the United States Constitution, is invalid. Moreover, since the assessment obligation arises out of the free and voluntary contract entered into by stockholders residing in New Jersey, and is in the nature of an ordinary commercial obligation, it may not be destroyed through a denial of the right to pursue ordinary legal remedies in the courts of New Jersey without at the same time depriving the creditors of The Bank of United States of their property without due process of law (*N. Y. Insurance Co.* v. *Dodge*, 246 U. S. 357; *N. Y. Life Insurance Co.* v. *Head*, 234 U. S. 159; *Insurance Co.* v. *Dunken*, 266 U. S. 389; *Insurance Co.* v. *Dick*, 281 U. S. 397). Again, in depriving, through the imposition of impossible conditions, the New York Superintendent of Banks, and through him the creditors of The Bank of United States, of the right to sue in New Jersey, Section 94b as applied by the judgment below violates that provision of the United States Constitution which entitles the citizens of each state to all the privileges, including the right to

sue, of the citizens in the several states (United States Constitution, Article IV, Section 2; *Corfield* v. *Coryell*, 4 Wash. (C. C.) 371, 380; *Lemmon* v. *People*, 20 N. Y. 562; *Paul* v. *Virginia*, 8 Wall. 168; *Ward* v. *Maryland*, 12 Wall. 418; *Slaughterhouse Cases*, 16 Wall. 36; *Cole* v. *Cunningham*, 133 U. S. 107; *Blake* v. *McClung*, 172 U. S. 239).

Referring to the general principle involved, Mr. Justice ROBERTS, in the recent decision of *Nebbia* v. *New York*, 291 U. S. 502, said:

> "And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

Again, in *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, this Court through Chief Justice TAFT said:

> "* * * such a result as that reached by the supreme court of Nebraska is to deny the injured taxpayer any remedy at all, because it is utterly impossible for him, by any judicial proceeding, to secure an increase in the assessment of the great mass of underassessed property in the taxing district."

Similarly, in *Chicago R. R. Co.* v. *City of Chicago*, 166 U. S. 226, this Court held:

> "* * * But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the

letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance, not to form. This Court, referring to the 14th Amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' Davidson *v.* New Orleans, 96 U. S., 97, 102. The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law."

POINT II.

Since Section 94b is unconstitutional, this action was properly instituted in the New Jersey Court of Law.

Apart from the effect of Section 94b, as declared by the Court below, it is firmly established by the highest court of the State of New Jersey that this action was properly brought at law in the State of New Jersey (*McDermott, as Receiver* v. *Woodhouse*, 87 N. J. Eq. 615; *Chicago Title & Trust Co.* v. *Young*, 90 N. J. Eq. 27; *Graham* v. *Fleissner*, 107 N. J. L. 273).

POINT III.

In any event, since the judgment below is final and the action was not transferred to the Court of Chancery of New Jersey, it is invalid.

In the Court of original jurisdiction, Mr. Justice PARKER, in his opinion, first intimated that either the action should be transferred to the New Jersey Court of Chancery or that the complaint should be dismissed with leave to institute an action in equity in compliance with Section 94b of the New Jersey statutes (R., p. 21). Thereafter, the Court entered an order over objections of counsel for plaintiff, directing not that the action be transferred to the Court of Chancery or be dismissed with leave to institute suit in equity pursuant to Section 94b of the New Jersey Corporation Act, *but that judgment final be entered in favor of the defendants* (R., p. 22). Pursuant to this order, final judgment was entered dismissing the complaint (R., p. 23). Upon appeal to the New Jersey Court of Errors and Appeals, counsel for plaintiff pointed out that the final judgment entered in the Court of original jurisdiction would be a bar to any action thereafter brought in the Court of Chancery by the Superintendent to recover the assessment liability of stockholders of The Bank of United States residing in New Jersey (Grounds of Appeal to N. J. Court of Errors and Appeals, No. 10, R., p. 28). In the Court of last resort in New Jersey counsel for plaintiff requested that if the contentions with regard to the unconstitutionality of Section 94b of the New Jersey statutes were rejected, in any event the final order and judgment of the Court below be modified so as to permit the institution of an action in

equity. The New Jersey Court of Errors and Appeals affirmed the judgment upon the opinion below and without modification (R., p. 29). This judgment was entered upon motion directed not only to the impropriety of instituting an action at law, but also to the maintenance of the action in any court in the State of New Jersey, as well as to the general insufficiency of the cause of action alleged in the complaint (R., pp. 12-14). While it would appear from the opinion of PARKER, J., that the motion was granted solely upon the failure of the plaintiff to comply with Section 94b, nevertheless the judgment entered is sufficient upon its face to incorporate all of the grounds upon which the motion was made. The final judgment dismissing the complaint entered upon such motion will therefore constitute a bar to the institution of any action by the New York Superintendent of Banks to recover the assessment from the New Jersey stockholders of The Bank of United States. Thus, in *State* v. *Wood*, 23 N. J. L. 560, the following definition of a final judgment appears:

> "The term *final*, as applied to a judgment or judicial award, has a technical, fixed and appropriate meaning. It denotes the *essential character* • • • of the order. It is used in contradiction to '*interlocutory*'."

In *Alley* v. *Nott*, 111 U. S. 472, at 475, Chief Justice WAITE said:

> "A demurrer to a complaint because it does not state facts sufficient to constitute a cause of action, is equivalent to a general demurrer to a declaration at common law, and raises an issue which, when tried, will finally dispose of the case as stated in the complaint, on its merits, unless leave to amend

> or plead over is granted. • • • There can be no other trial except at the discretion of the court, and *if final judgment is entered on the demurrer, it will be a final determination of the rights of the parties which can be pleaded in bar to any other suit for the same cause of action.*" (Italics ours.)

To like effect, see *Gould* v. *Evansville R. R. Co.*, 91 U. S. 526; *Hirschbach* v. *Ketchum*, 79 App. Div. 561; *Swords* v. *Nutt*, 9 Fed. (2d) 421, affirmed 11 Fed. (2d) 936; *Winship* v. *Ricketts*, 32 Fed. (2d) 476; *Highway District* v. *Bridge Co.*, 170 Ark. 22.

Under the authorities already discussed at length under Point I of this brief, the final judgment of the Court below violates the constitutional requirements aside from the question of the validity of Section 94b and the necessity of compliance with its provisions by the Superintendent.

POINT IV.

The judgment below should be reversed and the action remanded to the New Jersey Courts for further proceedings in accordance with the provisions of the Constitution of the United States.

Respectfully submitted,

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APPENDIX OF NEW YORK STATUTES.

Section 48

New York Banking Law

"Approval of superintendent; filing.—In any case in which this chapter makes the approval of the superintendent a condition precedent to the doing of any act, it shall lie within his sound discretion to grant or refuse his approval. Such approval, if granted, shall be in writing and a copy thereof shall be filed in the office of the superintendent."

Section 57

New York Banking Law

"When superintendent may take possession of delinquent corporation, banker or personal loan broker.—The superintendent may forthwith take possession of the business and property of any corporation to which this chapter is applicable, or any individual banker or personal loan broker, or any private banker to which article four of this chapter is applicable whenever it shall appear that such corporation or banker:

"1. Has violated its charter or any law;

"2. Is conducting its business in an unauthorized or unsafe manner;

"3. Is in an unsound or unsafe condition to transact its business;

"4. Cannot with safety and expediency continue business;

"5. Has an impairment of its capital;

"6. Has suspended payment of its obligations;

"7. Has neglected or refused to comply with the terms of a duly issued order of the superintendent;

"8. Has refused, upon proper demand, to submit its records and affairs for inspection to an examiner of the banking department;

"9. Has refused to be examined upon oath regarding its affairs.

"The superintendent may also forthwith take possession of the business and property of any savings and loan association which for two years after due demand or notice of withdrawal has been filed with it by any shareholder, has failed to pay matured shares or withdrawals or any part thereof as provided in section three hundred ninety-eight of this chapter."

SECTION 60

NEW YORK BANKING LAW

"Manner and time within which action of superintendent in taking possession may be tested.—At any time within ten days after the superintendent has taken possession of the property and business of any such corporation, banker or broker, such corporation, banker or broker may apply to the supreme court, in the judicial district in which the principal office of such corporation, banker or broker is located, for an order requiring the superintendent to show cause why he should not be enjoined from continuing such possession. The court may, upon good cause shown, direct the superintendent to refrain from further proceedings and to surrender such possession."

SECTION 69

NEW YORK BANKING LAW.

"Liquidation and conservation of assets; compounding debts and compromising certain claims.—The superintendent is authorized, upon taking possession of the property and business of such corporation or private or individual banker or personal loan broker, to liquidate the

affairs thereof and to do all acts and to make such expenditures as in his judgment are necessary to conserve its assets and business. He shall proceed to collect the debts due. He may upon an order of the supreme court, sell or compound all bad or doubtful debts held by, and compromise claims against such corporation, banker or broker, other than deposit claims, and, upon such terms as the court shall direct, may sell or otherwise dispose of all or any of the real and personal property of such corporation, banker or broker. In case any of the real property so sold is located in a county other than the county in which the application to the court for leave to sell the same is made, the superintendent shall cause a certified copy of said order to be filed in the office of the clerk of the county in which such real property is located."

SECTION 71

NEW YORK BANKING LAW.

"Superintendent's power to sue, execute instruments, et cetera, for delinquent; actions and proceedings preferred; exemption from filing fees.—For the purpose of executing any of the powers and performing any of the duties hereby conferred upon him, the superintendent may, in the name of the delinquent corporation or private or individual banker or personal loan broker, prosecute and defend any and all actions and legal proceedings. Any such action or proceeding, upon application of the superintendent, shall be entitled to the same preference to which an action or proceeding by or against a receiver appointed by the court is entitled in any court of the state. He may, in the name of the delinquent corporation, banker or broker, execute, acknowledge and deliver any and all deeds, assignments, bills of sale, releases, extensions, satisfactions and other instruments necessary and proper to effectuate any sale, lease or transfer of real or personal property or to carry into effect any power conferred or duty imposed upon him by this article or by order of the supreme court. Any

instrument executed pursuant to the authority hereby given shall be as valid and effectual for all purposes as though the same had been executed by the officers of the delinquent corporation by authority of its board of directors, or by the private or individual banker or personal loan broker personally. The superintendent shall not be required to pay any fee to any public officer for filing or recording any paper or instrument executed in pursuance of any power conferred on him by this section."

Section 72

New York Banking Law

"Notice to creditors to make proof of claims. When the superintendent shall have taken possession, under the provisions of section fifty-seven of this chapter of such corporation, private banker, savings and loan association, or credit union, or the business and property in this state of a foreign banking corporation and shall have determined to liquidate its affairs, or the business and property in this state of the foreign banking corporation, he shall notify all persons who may have claims against such corporations, banker, savings and loan association, credit union, or the New York agency or agencies of the foreign banking corporation, to present the same to him and make proper proof thereof within four months from the date of said notice and at a place specified therein; provided, that if the superintendent finds that a shorter period than four months will afford a reasonable time for presenting claims and making proof thereof, he may specify such shorter period which shall in no event be less than thirty days. In any event he shall specify in said notice the last date for presenting claims and the last date for making proof thereof. He shall cause said notice to be mailed to all persons whose names appear as creditors upon the books of the corporation, banker, savings and loan association, credit union or of the New York agency or agencies of the foreign banking corpo-

ration. He shall also cause said notice to be inserted weekly in such newspapers as he may direct for three consecutive months, the first insertion thereof to be published more than ninety days before the last day fixed in said notice for presenting proof of claims; provided, that where the notice requires claims to be presented within less than four months, he shall cause said notice to be inserted weekly in such newspapers as he may direct for three consecutive weeks, the first insertion thereof to be published more than twenty-one days before the last day fixed in said notice for presenting claims. The superintendent shall have no power to accept any claim presented after the date specified in such notice as the last date for presenting claims.

"Where the superintendent has taken possession of the business and property in this state of a foreign banking corporation, under the provisions of section fifty-seven of this chapter, he shall cause to be mailed to the principal office of such foreign banking corporation, or to the duly appointed domiciliary liquidator, or receiver of such foreign banking corporation, a copy of said notice together with a copy of sections fifty-seven and seventy-two of this chapter."

SECTION 73

NEW YORK BANKING LAW

"Superintendent to list claims duly presented; when and where filed.—The superintendent shall make in duplicate a complete list of all claims duly presented, and shall specify therein the name of the claimant, the nature of the claim, and the amount thereof. Within ten days after the last date fixed in said notice to creditors to present and make proof of claims, the superintendent shall file one copy of said list in his office, and cause one copy to be filed in the office of the clerk of the county in which the principal office of such corporation or private or individual banker or personal loan broker is located."

Section 74

New York Banking Law

"Objections to claims presented may be filed with superintendent within certain time; procedure upon claim under objection.—Within thirty days after the last date fixed in said notice to creditors to present and make proof of claims, objections to any claim duly presented may be made by any party interested, by filing with the superintendent such objections in writing, signed by the objector and duly verified. Unless the superintendent rejects any claim to which objections have been duly filed with him, he shall, within thirty days after the time to file such objections has expired, apply to the supreme court, upon notice to the objector, for an order directing the superintendent as to the disposition of said claim. The court may thereupon dispose of said objections or may order a reference for that purpose."

Section 75

New York Banking Law.

"Superintendent may accept or reject claims; list of claims accepted to be filed.—The superintendent shall, not later than thirty days after the time has expired to file objections to claims duly presented, accept or reject every duly filed claim except claims as to which objections are still pending undetermined by the court. Every claim accepted by him, he shall endorse 'accepted' and file so endorsed in his office. If he doubts the justice or validity of any claim, he shall reject such claim and shall endorse the same 'rejected' and file said claim so endorsed in his office. He shall cause notice of such rejection to be served upon the claimant either personally or by mail. The superintendent shall not determine priorities, in accepting or rejecting claims; but accepted claims shall be presented to the supreme court pursuant to section seventy-eight of this article for determination as to their priority of pay-

ment. Within thirty days after the superintendent has accepted or rejected all claims duly filed, he shall list all claims accepted and all rejected by him and file one copy of said list in his office and one copy in the office of the clerk of the county in which the principal office of such corporation or private or individual banker or personal loan broker is located."

SECTION 76

NEW YORK BANKING LAW.

"Effect of accepting claims; statute of limitations for actions upon claims not accepted; necessary allegations.—When the superintendent has accepted a duly filed claim and has filed the same endorsed 'accepted' in his office, the claimant, unless such claim is entitled by law to priority of payment, shall be entitled to share ratably with other general creditors in the distribution of the assets of such corporation or private or individual banker or personal loan broker as such assets are distributed pursuant to section seventy-eight of this article.

"When the time within which the superintendent is required to accept or reject claims has expired and at any time within six months thereafter, a claimant whose claim has been duly filed and has not been accepted by the superintendent may institute and maintain an action thereon against such corporation, banker or broker.

"No action shall be maintained against such corporation, banker or broker while the superintendent is in possession of its affairs and business unless brought within the period of limitation specified in this section. In all actions or proceedings instituted against such corporation, banker or broker while the superintendent is in possession of its property and business, the plaintiff shall be required to allege and prove that the claim upon which the action is instituted was duly filed and that sixty days have elapsed since the expiration of time for filing said claim and that said claim has not been accepted."

Section 78

New York Banking Law.

"Dividends to creditors; priorities; disposition of unclaimed dividends.—At any time after the date fixed by the superintendent for the presentation of claims, the supreme court may by order authorize the superintendent upon his application to declare out of the funds remaining in his hands after the payment of expenses, one or more dividends. Such order shall specify what claims, if any, are entitled to priority of payment, and shall direct the superintendent regarding the manner of payment of such prior claims. At any time after the expiration of eight months from said date fixed for the presentation of such claims, he may by like order declare a final dividend. Such dividends shall be paid to such persons, in such amounts, and upon such notice, as the supreme court in the judicial district in which the principal office of such corporation or private or individual banker or personal loan broker is located, may by order direct. Dividends remaining unclaimed or unpaid in the hands of the superintendent for six months after the order for final distribution, shall be deposited by him as provided in section forty-five of this article."

Section 79

New York Banking Law.

"Superintendent shall call stockholders' meeting after creditors are paid in full; proceedings at such meeting.—Whenever the superintendent shall have paid to each creditor of any stock corporation whose claim has been duly proved the full amount of such claim, and shall have made proper provision for claims in litigation and not finally determined, and shall have paid all the expenses of liquidation, and shall have returned to stockholders who have paid to him the amounts demanded pursuant to section eighty of this article, their pro rata share of any such

amounts not finally necessary to pay creditors in full, he shall call a meeting of the stockholders of such corporation by causing notice of the time and place of such meeting to be published at least once a week for three successive weeks in one or more newspapers selected by him and published in the county where the principal office of such corporation is located. At such meeting, the stockholders shall determine whether the superintendent shall continue as liquidator to wind up the affairs of such corporation, or whether the stockholders themselves shall elect an agent or agents for that purpose. In determining these matters, the stockholders shall vote by ballot in person or by proxy. Each share of stock shall be entitled to one vote and the vote of a majority of the issued stock shall be necessary to a determination. In case it is determined to continue the liquidation under the superintendent, he shall continue the liquidation of the affairs of such corporation and after paying the expenses thereof, shall distribute the proceeds among the stockholders in proportion to the several holdings of stock and in such manner and upon such notice as may be directed by order of the supreme court. Upon a petition by the superintendent showing that all the assets of such corporation have been duly distributed and that unclaimed sums have been duly deposited by him as provided in section forty-five of this article and that more than one year has elapsed since the last required publication of notice to creditors to present their claims, and upon such notice as the court may prescribe, the supreme court may, on such terms as justice requires, make an order affirming such dispositoin of such unclaimed sums and declaring such corporation dissolved and the corporate existence thereof terminated. Upon the filing of a certified copy of such order in the office of the superintendent, the existence of such corporation shall cease and determine.

"In case the stockholders shall determine to appoint an agent or agents to continue such liquidation, they shall thereupon select by ballot such agent or agents. A ma-

jority of the stock present and voting in person or by proxy shall be necessary to determine such question. If such agent or agents shall be duly elected by the stockholders, the superintendent may require such agent or agents to execute and deliver to him a bond to the people of the state, in such amount, with such sureties, and in such form as shall be approved by him, conditioned upon the performance of all the duties of his or their trust; and thereupon the superintendent shall transfer and deliver to such agent or agents all the assets of such corporation then remaining in his hands. Upon such transfer and delivery, the superintendent shall be discharged from any and all further liability to such corporation and its creditors. Upon the transfer and delivery of said assets by the superintendent, he shall file a certified copy of the proceedings of said meeting in his office and cause a certified copy to be filed in the office of the clerk of the county in which the principal office of such corporation was located. No banking powers shall be exercised by such corporation after the superintendent has filed such certified copy in his office."

SECTION 80

NEW YORK BANKING LAW.

"Superintendent may enforce payment of statutory liability of stockholders; notice thereof, and effect of failure to pay at time fixed.—Whenever a liability of stockholders for the amount of their respective shares of any such corporation exists, and the superintendent has duly taken possession of the property and business of such corporation, and has duly notified creditors to present and make proof of their respective claims and the last day to present such claims has expired, and he has determined from his examination of its affairs that the reasonable value of the assets of such corporation is not sufficient to pay its creditors in full, he may enforce the individual liability of such stockholders in whole or in part. In case he determines to en-

force such liability, he shall make demand in writing upon such stockholders by causing such demand to be enclosed in sealed envelopes addressed and mailed, postage prepaid, to said respective stockholders at their last known places of address as the same appear upon the stock ledger of such corporation or at their last known address if no address appears in said ledger. Such demand shall state the total amount assessed by the superintendent against the stockholders and the equal and pro rata share assessed against each stockholder for each share of stock, and the total amount of such assessment for all the shares of stock of such stockholder. Such demand shall also fix a date, not earlier than thirty days from the date of such notice, upon which such stockholders shall be required to pay such assessment to the superintendent. In case any such stockholder shall fail or neglect to pay such assessment within the time fixed in said notice, the superintendent shall have a cause of action, in his own name as superintendent of banks, against such stockholder either severally or jointly with other stockholders of such corporation, for the amount of such unpaid assessment or assessments, together with interest thereon from the date when such assessment was, by the terms of said notice, due and payable. In any such action, the written statement of the superintendent, under his hand and seal of office, reciting his determination to enforce the individual liability, or any part thereof, of such stockholders, and setting forth the value of the assets of such corporation and the liabilities thereof, as determined by him after examination and investigation, shall be presumptive evidence of such facts as therein stated."

SECTION 120

NEW YORK BANKING LAW

"Rights and liabilities of stockholders; who liable as stockholders; who may enforce liability; within what time action must be commenced.—The rights, powers and duties

of stockholders of banks shall be as prescribed in the general corporation law and the stock corporation law; but the individual liability of such stockholders for the contracts, debts, and engagements of the bank and the time within which an action may be instituted to enforce such liability shall be governed exclusively by the provisions of this section and section eighty of this chapter.

"The stockholders of every bank shall be individually responsible, equally and ratably and not one for another, for all contracts, debts and engagements of the bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. An action to enforce such liability must be brought within six years after the cause of action has accrued. The term 'stockholder' as used in this section shall apply to:

"1. Such persons as appear by the books of the bank to be stockholders;

"2. Every owner of stock, legal or equitable, although the same may be on such books in the name of another person, provided, however, that such term shall not apply to a person holding stock as collateral security for the payment of a debt and not appearing by the books of the bank to be the owner and holder thereof in his own right, or to a person holding stock in a bona fide fiduciary capacity and not appearing by the books of the bank to be the owner and holder thereof in his own right unless such fiduciary shall have invested the funds in his care in violation of law or of the terms under which said funds are held by him, in which case he shall be personally liable as a stockholder.

"No person who has in good faith, and without any intent to evade his liability as a stockholder, caused his stock to be transferred on the books of the bank when such bank is solvent to any resident of this state of full age previous

to any default in the payment of any debt or liability of the bank, shall be subject to any personal liability for any contracts, debts or engagements of the bank.

"In case the superintendent of banks shall have taken possession of the property and business of the bank pursuant to section fifty-seven of this chapter or a permanent receiver of such bank shall have been appointed, all actions or proceedings to enforce the liability of stockholders under this section shall be taken and prosecuted only in the name of the superintendent or the receiver, as the case may be, unless the superintendent or receiver shall refuse to take such action or proceeding upon proper request in writing made by any creditor, or shall have failed or neglected to commence such action or proceeding within sixty days after the receipt of such request, and in that event such action or proceeding may be taken by any creditor of the bank. But no such action shall be brought by a creditor until a judgment shall have been recovered by him against the bank and an execution thereon shall have been returned unsatisfied in whole or in part."